# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 668

McKINLEY E. GORE, PETITIONER,

*vs.*

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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# JOINT APPENDIX

1 IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HOLDING A CRIMINAL TERM

(File Endorsement Omitted)

Criminal No. 449-55

Grand Jury No. 542-55

Vio. 26 U.S.C. 4704a, 4705a, 21 U.S.C. 174

THE UNITED STATES OF AMERICA

vs.

McKINLEY E. GORE

Grand Jury Impanelled March 31, 1955, Sworn in on April 5, 1955

**Indictment—Filed May 9, 1955**

The Grand Jury charges:

On or about February 26, 1955, within the District of Columbia, McKinley E. Gore did sell, barter, exchange and give away to Arthur Lewis narcotic drugs that is, twenty capsules containing a mixture totaling about 24.5 grains of heroin hydrochloride, quinine hydrochloride, milk sugar and sucaryl; and three capsules containing a mixture totaling about four grains of cocaine hydrochloride and milk sugar, not in pursuance of a written order, written for that purpose, from the said Arthur Lewis, as provided by law.

SECOND COUNT:

On or about February 26, 1955, within the District of Columbia, McKinley E. Gore purchased, sold, dispensed and distributed, not in the original stamped packaged and not from the original stamped package, narcotic drugs,

that is, twenty capsules containing a mixture totaling about 24.5 grains of heroin hydrochloride, quinine hydrochloride, milk sugar and sucaryl; and three capsules containing a mixture totaling about four grains of cocaine hydrochloride and milk sugar. These are the same narcotic drugs referred to in the first count of this indictment.

THIRD COUNT:

On or about February 26, 1955, within the District of Columbia, McKinley E. Gore facilitated the concealment and sale of a narcotic drug, that is, twenty capsules containing a mixture totaling about 24.5 grains of heroin hydrochloride, quinine hydrochloride, milk sugar and sucaryl, after the said heroin hydrochloride had been imported, with the knowledge of McKinley E. Gore, into the United States contrary to law. This is the same heroin hydrochloride referred to in the first and second counts of this indictment.

FOURTH COUNT:

On or about February 28, 1955, within the District of Columbia, McKinley E. Gore did sell, barter, exchange and give away to Arthur Lewis a narcotic drug, that is, thirty-five capsules containing a mixture totaling about 38.7 grains of heroin hydrochloride, quinine hydrochloride and milk sugar, not in pursuance of a written order, written for that purpose, from the said Arthur Lewis, as provided by law.

FIFTH COUNT:

On or about February 28, 1955, within the District of Columbia, McKinley E. Gore, purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, thirty-five capsules containing a mixture totaling about 38.7 grains of heroin hydrochloride, quinine hydrochloride and milk sugar. This is the same heroin hydrochloride which is mentioned in the fourth count of this indictment.

SIXTH COUNT:

On or about February 28, 1955, within the District of Columbia, McKinley E. Gore facilitated the concealment and sale of a narcotic drug, that is, thirty-five capsules containing a mixture totaling about 38.7 grains of heroin hydrochloride, quinine hydrochloride and milk sugar, after the said heroin hydrochloride had been imported, with the knowledge of McKinley E. Gore, into the United States contrary to law. This is the same heroin hydrochloride which is referred to in the fourth and fifth counts of this indictment.

/s/ LEO A. ROVER
*Attorney of the United States in and for the District of Columbia*

A TRUE BILL:

/s/ HARRY GANDY, JR.
*Foreman.*

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IN UNITED STATES DISTRICT COURT

(File Endorsement Omitted)

**Arraignment and Plea of Defendant—Filed May 13, 1955**

On this 13th day of May, 1955, the defendant McKinley E. Gore, appearing in proper person requests counsel be appointed by the Court, which is so ordered, and, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads Not Guilty thereto.

The defendant is remanded to the District of Columbia jail.

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3 (File Endorsement Omitted)

**Verdict—Filed June 2, 1955**

On this 1st day of June, 1955, came again the parties aforesaid, in manner as aforesaid, the same jury as aforesaid in this cause, the hearing of which was respited on May 27, 1955; whereupon, Juror No. 6, Ralph Galope becoming unable to perform his duties as a juror is

excused from further service on this jury; thereupon, Alternate Juror No. 1, Mattie McMahan is directed to take seat No. 6 in the jury box; whereupon, Alternate Juror No. 2 is discharged; thereupon, the jury upon their oath say that the defendant is guilty as indicted; whereupon, each and every member of the jury is asked if that is his or her verdict and each and every member thereof say that the defendant is guilty as indicted.

The case is referred to the Probation Officer of the Court and the defendant is remanded to the District of Columbia Jail.

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IN UNITED STATES DISTRICT COURT

(File Endorsement Omitted)

**Judgment and Commitment—Filed June 28, 1955**

On this 24th day of June, 1955 came the attorney for the government and the defendant appeared in person and[1] by counsel, J. Leon Williams, Esquire.

It Is Adjudged that the defendant has been convicted upon his plea of[2] not guilty and a verdict of guilty of the offense of

Violation of Sections 4704a and 4705a, Title 26 and Section 174, Title 21, of the United States Code

as charged[3]

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] One (1) year to Five (5) years and to pay a fine of $500 on Count

One; One (1) year to Five (5) years and to pay a fine of $500 on Count Two to take effect at the expiration of sentence imposed on Count One; One (1) year to Five (5) years and to pay a fine of $500 on Count Three to take effect at the expiration of sentence imposed on Count Two; One (1) year to Five (5) years and to pay a fine of $500 on each of Counts Four, Five and Six to run concurrently by the counts and to run concurrently with the sentence imposed on Counts One, Two and Three; said sentence to take effect at the expiration of sentence imposed in Criminal Case No. 450-55.

It Is Adjudged that the execution of the said sentence be, and hereby is suspended insofar as the payment of the fine is concerned, ONLY.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ LUTHER YOUNGDAHL,
*United States District Judge.*

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IN UNITED STATES DISTRICT COURT

(File Endorsement Omitted)

**Motion to Vacate, Set Aside, or Correct Sentence, Provided by Title 28, Section 2255, Federal Rule of Criminal Procedure—Filed March 24, 1956**

Comes now the petitioner, McKinley E. Gore, in proper person pursuant to Title 28, Section 2255, U.S.C. and move this honorable Court to vacate sentence that was in excess of the maximum authorized by law.

Criminal Case # 449-55 United States of America vs. McKinley E. Gore, and as cause therefore, show the court as follows:

That the petitioner is a citizen of the United States of America, and over twenty-one (21) years of age, and at present confined in the D. C. Reformatory, Lorton, Virginia.

The petitioner was sentenced in criminal case # 449-55, to imprisonment for a period of one (1) year to five (5) years and to pay a fine of five hundred ($500.00) dollars on count one; one (1) year to five (5) years and to pay a fine of five hundred ($500.00) dollars on count two; to take effect at expiration of sentence imposed on count one; one (1) year to five (5) years and to pay a fine of five hundred ($500.00) dollars on count three; to take effect at the expiration of sentence imposed on count two; one (1) year to five (5) years and to pay a fine of five hundred ($500.00) dollars on each of counts four, five, and six to run concurrently with the sentence imposed on counts one, two and three; said sentence to take effect at the expiration of sentence imposed in criminal case # 450-55.

The petitioner maintains that the Court violated the law under Title 21 Section 174.

When petitioner was sentenced by the Honorable Judge Luther W. Youngdahl to serve in prison a sentence of five (5) to fifteen (15) years, for first offender.

Public Law 255-82nd Congress, Chapter 666, 1st session, H.R. 3490. An Act: To amend the penalty provisions applicable to persons convicted of violation certain narcotic laws, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that section 2 (c) of the Narcotic Drugs Import and Export Act, as amended (U.S.C., Title 21, Sec. 174), is amended to read as follows:

(c) Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale or any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two (2) or more than

five (5) years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five (5) or more than ten (10) years.

Jurisdiction of this Court is invoked pursuant to provisions of Title 28, Section 2255, United States Code, which reads in pertinent parts as follows:

TITLE 28, SECTION 2255, U.S. CODE

"A prisoner in custody under sentence of a court established by act of congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the Court which imposed the sentence to vacate, set aside, or correct the sentence."

"A motion for such relief may be made at any time."

"Unless the files and records in the case and the motion conclusively show that the prisoner is entitled to no relief, the Court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect there to."

"If the Court finds that the judgment was rendered without jurisdiction, or that sentence imposed was not authorized by law or otherwise subject to collateral attack, or that there has been such a denial or infringement of the Constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the Court shall vacate and set aside and shall discharge the prisoner or re-sentence him, or grant a new trial or correct the sentence as may appear appropriate."

**Opinions of the Petitioners**

1. It is the opinion of the petitioner that the law allows petitioner to proceed in said actions, because of the following reasons:

a. Because of his financial status.

b. Because he was illegally sentenced.

c. Because certain points of law were not explained to petitioner by counsel, at time of sentence.

d. Because petitioner received a letter from the Honorable Senator Hale Boggs, stating: "That sentence of Title 21, Section 174, is a mandatory sentence."

2. It is the opinion of the petitioner that he be allowed to proceed in said action, because petitioner feels that the ends of Justice be better served if allowed by the Honorable Court to proceed.

The petitioner prays that the Honorable Court will allow petitioner to proceed without prepayment of costs.

/s/ McKinley E. Gore
McKinley E. Gore
*Petitioner*

Subscribed and sworn to before me this 21st day of March, 1956.

/s/ Wade G. Maddox
*Notary Public*

My Commission Expires October 31, 1958.

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(File Endorsement Omitted)

**Denial—Filed April 11, 1956**

The records and files and motion of this case conclusively show that the petitioner is entitled to no relief under Sec. 2255.

/s/ Luther W. Youngdahl
*District Judge*

7 IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HOLDING A CRIMINAL TERM

(File Endorsement Omitted)

Criminal No. 450-55

Grand Jury No. 543-55

Robbery (22 D.C.C. 2901)

THE UNITED STATES OF AMERICA

v.

McKINLEY E. GORE

Grand Jury Impanelled March 31, 1955, Sworn in on April 5, 1955

**Indictment—Filed May 9, 1955**

The Grand Jury charges:

On or about April 1, 1955, within the District of Columbia, McKinley E. Gore, by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession of Thomas A. Bryant property of Thomas A. Bryant consisting of $230.00 in money.

/s/ LEO A. ROVER
*Attorney of the United States in and for the District of Columbia*

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IN UNITED STATES DISTRICT COURT

(File Endorsement Omitted)

**Arraignment and Plea of Defendant—Filed May 13, 1955**

On this 13th day of May, 1955, the defendant McKinley E. Gore, appearing in proper person requests counsel be appointed by the Court, which is so ordered, and, being

arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads Not Guilty thereto.

The defendant is remanded to the District of Columbia jail.

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IN UNITED STATES DISTRICT COURT

(File Endorsement Omitted)

**Withdrawal of Plea—Filed June 20, 1955**

On this 20th day of June, 1955, the defendant McKinley E. Gore, appearing in proper person and by his attorney J. Leon Williams, Esquire, in open Court withdraws his plea of not guilty to the indictment heretofore entered and pleads guilty to Assault with Intent to Commit Robbery.

The case is referred to the Probation Officer of the Court and the defendant is remanded to the D. C. Jail.

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IN UNITED STATES DISTRICT COURT

(File Endorsement Omitted)

**Judgment and Commitment—Filed June 28, 1955**

On this 24th day of June, 1955 came the attorney for the government and the defendant in person and[1] by counsel, J. Leon Williams, Esquire

It Is Adjudged that the defendant has been convicted upon his plea of[2] guilty of the offense of

Assault With Intent to Commit Robbery

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Two (2) years to Six (6) years

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9 IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

(File Endorsement Omitted)

No. 13,493

McKINLEY E. GORE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

*Mr. McKinley E. Gore*, appellant, filed a brief, *pro se*, and his case was treated as submitted thereon.

*Mr. Forbes Blair*, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, *Lewis Carroll* and *Joel Blackwell*, Assistant United States Attorneys, were on the brief, for appellee.

Before BAZELON, FAHY and BASTIAN, Circuit Judges.

**Opinion—Decided April 25, 1957**

BASTIAN, *Circuit Judge:* Appellant (defendant) was tried and convicted under each count of a six-count indictment charging violations of 26 U.S.C. § 4705 (a),[1]

[1] "(a) *General requirement.* It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

26 U.S.C. § 4704 (a)[2] and 21 U.S.C. § 174.[3] No appeal was taken; but some months later the defendant filed in the District Court a motion under § 2255 of Title 18, United States Code, to vacate, set aside or correct the sentences. The present appeal is from the denial of that motion.

The offenses charged in the first three counts relate to a transaction involving the same twenty-five capsules of narcotics and on the same date, whereas the offenses charged in the last three counts relate to another thirty-five capsules of narcotics involved in a transaction on another date.

The trial court sentenced the defendant to imprisonment for from one to five years and imposed a fine of $500.00 on each of the first three counts, the sentences to run consecutively. On each of counts four, five and six, defendant was fined $500.00 and sentenced to imprisonment for from one to five years, these latter sentences to run concurrently with the sentences on the first three counts. All fines were suspended.

The authorities are unanimous that a defendant may be convicted and sentenced under each of several counts

[2] "(a) *General requirement.* It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

[3] Section 174 provides in part: "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years."

of an indictment if each count states a different offense. The test of whether separate offenses are charged is whether some different evidence is essential to each count, or whether each count is supported by the same evidence. We said recently in *Kendrick* v. *United States*, ——— U.S. App.D.C. ——, 238 F.2d 34 (1956):

> "A single act which violates two statutes is punishable under both, unless the offenses defined therein are identical. The test of identity is whether the same evidence will sustain both charges. If one of the offenses requires an element of proof which the other does not, a conviction of one does not bar prosecution for the other." *Id.* at 36.

See also *Blockburger* v. *United States*, 284 U.S. 299 (1932). When Congress enacted 26 U.S.C. §§ 4704 (a) and 4705 (a), and 21 U.S.C. § 174, it created three separate offenses. Each involves a different facet of the narcotics trade and each has different evidentiary requirements. This court and courts of a number of the other circuits, including the First, Fifth, Sixth, Seventh, Eighth and Ninth, have approved convictions and separate and consecutive sentences for violation of the same statutes involved here, or their predecessors, where each offense arose from one common transaction.[4] And, as re-
12 cently as January 2, 1956, the Third Circuit, in a well reasoned opinion by Judge Maris in *United States* v. *Brisbane*, 239 F.2d 859, a case identical to the present one, reached the same conclusion.

As in Brisbane, the defendant here further urges that, as he is a first offender, the sentences imposed on him violate the limits set by 26 U.S.C. § 7237 (a), popularly known as the Boggs Act. Since the defendant was sen-

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[4] *Solomon* v. *United States*, 58 App.D.C. 182, 26 F.2d 554 (1928); *Long* v. *United States*, 235 F.2d 183 (6th Cir. 1956); *United States* v. *Johnson*, 235 F.2d 159 (7th Cir. 1956); *Torres Martinez* v. *United States*, 220 F.2d 740 (1st Cir. 1955); *United States* v. *Brown*, 207 F.2d 310 (7th Cir. 1953); *Bruno* v. *United States*, 164 F.2d 693 (9th Cir. 1947), *cert. denied*, 333 U.S. 832 (1948); *Sorrentino* v. *United States*, 163 F.2d 627 (9th Cir. 1947); *McIntosh* v. *White*, 21 F.2d 934 (8th Cir. 1927); *Vamvas* v. *United States*, 13 F.2d 347 (1926).

tenced to from three to fifteen years on his first conviction and the maximum sentence for a first offense, under the Boggs Act, is two to five years, his contention has a superficial appeal. However, defendant was tried, convicted and sentenced, not for *one* offense but for *three*, and his sentences do not exceed the maximum for first offenders on each count. So viewed, defendant's contention loses even its superficial appeal.

The Boggs Act, on which appellant bases his contention, was passed to deter the criminal who engages in illicit drug traffic and to increase the penalty for illegal traffic in drugs. See H.R. Rep. No. 635, 82d Cong., 1st Sess., June 21, 1951; S. Rep. No. 1051, 82d Cong., 1st Sess., Oct. 1, 1951; *United States* v. *Brisbane*, *supra*.

It having been long and well established, as above stated, that each count of such an indictment as is here involved states a separate offense, we can uphold defendant's contention only by holding that the three counts must be considered as a single offense, thereby causing his sentence to exceed the maximum for first offenders. We cannot accept this reasoning when its effect would be to reduce sentences for separate and distinct offenses by the use of a statute intended to increase the penalties. Support for rejecting defendant's contention is found in decisions of four other circuits dealing with the same statutes involved here. We cite these decisions with approval. *United States* v. *Brisbane*, *supra*; *United States* v. *Lewis*, 227 F.2d 524 (2d Cir. 1955), *cert. denied*, 350 U.S. 974 (1956); *Everett* v. *United States*, 227 F.2d 457 (6th Cir. 1955); *Beacham* v. *United States*, 218 F.2d 528 (10th Cir. 1955).

In *Brisbane* the defendant urged (1) that he received three separate sentences for a single action, a sale of heroin, which could result in only one offense against the United States; and (2) that the sentences aggregated a period of imprisonment, nine years, which was in excess of the maximum permitted by the Boggs Act for a first offender, which the defendant admittedly was. Both contentions were decided adversely to the defendant.

Consistently with the other circuits which have passed on the question, we conclude that sentence on each sepa-

rate offense of which defendant was convicted was valid, was within the limits prescribed by law, and, in the discretion of the trial court, could be made to run consecutively.

It follows that the action of the District Court was correct.

*Affirmed.*

BAZELON, *Circuit Judge*, concurring: A drug-peddler dispenses to his customers drugs which he has possessed and concealed; he dispenses them without prescriptions on official treasury forms; and he dispenses them not in or from stamped packages. By legislating separately against each component part of the transaction, Congress facilitated the prosecution and conviction of any who ply the illicit trade. It clearly intended that a person against whom any one of the defined phases of a drug-selling transaction is proved should be punished. It does not follow, however, that by providing for a five-year sentence for a violation of any of the statutes, Congress intended that one who performs the entire transaction receive a cumulative sentence of fifteen years.[1] If we

[1]That Congress intended that drug peddlers be severely punished is beyond doubt. The purpose of the Boggs Act was to provide mandatory minimum sentences and to permit increasingly high maximum sentences for repeated violations. It made possible a 20-year sentence for a third violation of 26 U.S.C. §§ 4704(a) or 4705(a) and precluded suspension of sentence or probation for such an offender. 26 U.S.C. § 7237(a). Similarly, a third offender could be sentenced to 20 years under 21 U.S.C. § 174. By the Act of July 18, 1956, c. 629, Title I, §§ 103 and 105, 70 Stat. 568, 570, the maximum penalty for narcotics repeaters was increased to 40 years.

This clear intent that the offender receive a severe sentence does not imply, however, that Congress also intended that cumulative sentences be imposed when a single criminal act results in separate convictions under all three statutes. *The intent to increase the punishment of a repeating drug-peddler which led Congress in 1956 to raise the maximum penalty to 40 years would seem to suggest rather that it had not been intended, before 1956, that he be punishable by a 60-year sentence.* The legislative history of the Narcotic Control Act of 1956 supports the view that the penalties Congress was providing were for the composite act of drug-peddling, not for the separate counts into which a prose-

were approaching afresh the question whether, in such a case, single or cumulative punishment is the legal course, I think we could not so easily conclude that the consecutive sentences here imposed are authorized. "It would be self-deceptive to claim that only one answer is possible to our problem." *United States* v. *Universal Corp.*, 344 U.S. 218, 224 (1952).

But the question is not one we are at liberty to approach afresh. We are bound by the decision of the Supreme Court in *Blockburger* v. *United States*, 284 U.S. 299 (1932). It may be that the "same evidence" test which has facilitated the fragmentation of crimes into multiple, separately punishable components is being abandoned in favor of a "same transaction" test. See *United States* v. *Universal Corp., supra; Bell* v. *United States*, 349 U.S. 81 (1955); *Prince* v. *United States*, —— U.S. ——, 25 U.S.L. WEEK 4182 (Feb. 25, 1957). Note also the granting of certiorari in cases presenting related problems: *Bartkus* v. *Illinois*, 352 U.S. 907 (1956); *Hoag* v. *New Jersey, ibid;* and *Ladner* v. *United States, ibid.* Unless we are freed from the controlling effect of *Blockburger*, however, we have no choice but to countenance the sentences here imposed.

I am authorized by Circuit Judge Fahy to state that he concurs in the views herein expressed.

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cutor's ingenuity could divide it. See, for example, Report to the House Committee on Ways and Means from the Subcommittee on Narcotics, May 10, 1956, 2 U.S.Code Cong. Serv. 3304 (1956):

> "It is recommended that *the convicted narcotic peddler* be sentenced to not less than 5 years for a first offense and not less than 10 years for a second or subsequent offence. Maximum sentences should be increased to 20 years and 40 years, respectively, for first offenses and for second and subsequent offenses *in the case of narcotic peddlers.*" (Emphasis supplied.)

16 IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

(File Endorsement Omitted)

No. 13,493

Criminal 449-55

McKinley E. Gore, *Appellant*,

v.

United States of America, *Appellee*.

Appeal from the United States District Court for the District of Columbia.

Before: Bazelon, Fahy and Bastian, *Circuit Judges*.

**Judgment—April 25, 1957**

This Cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On Consideration Whereof, It is ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Per Circuit Judge Bastian.

Separate concurring opinion by Circuit Judge Bazelon.

17 IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

(File Endorsement Omitted)

No. 13,493

McKinley E. Gore, *Appellant*,

v.

United States of America, *Appellee*.

Before: Bazelon, Fahy and Bastian, *Circuit Judges*, in Chambers.

**Order Vacating Judgment—June 4, 1957**

It is Ordered by the Court, sua sponte, that the judgment of this Court entered herein April 25, 1957, be, and it is hereby, vacated.

Per Curiam.

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18 IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,493

Criminal 449-55

McKinley E. Gore, *Appellant*,

v.

United States of America, *Appellee*.

Appeal from the United States District Court for the District of Columbia.

Before: Bazelon, Fahy and Bastian, *Circuit Judges*.

**Judgment—Dated: June 5, 1957**

This Cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On Consideration Whereof, It is ordered and adjudged by this Court that the order of the said District

Court appealed from in this cause be, and the same is hereby, affirmed.

Per Circuit Judge Bastian.

Separate concurring opinion by Circuit Judge Bazelon.

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21 Clerk's Certificate to foregoing transcript omitted in printing

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22 SUPREME COURT OF THE UNITED STATES

No. 76 Misc., October Term, 1957

McKinley E. Gore, *Petitioner*,

vs.

United States of America

**Order Granting Motion for Leave to Proceed in Forma Pauperis and Granting Petition for Writ of Certiorari—December 16, 1957**

On Consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted. The case is transferred to the appellate docket as No. 668.

☆ U. S. GOVERNMENT PRINTING OFFICE 1958—454499/P. O. 1103

Office - Supreme Court, U.S.
FILED
APR 9 1958
JOHN T. FEY, Clerk

# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1957**

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## No. 668

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McKINLEY E. GORE,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## BRIEF FOR PETITIONER

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JOSEPH L. RAUH, JR.,
*1631 K Street, N.W.,*
*Washington 6, D. C.,*

JAMES H. HELLER,
*Woodward Building,*
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# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1957**

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## No. 668

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McKINLEY E. GORE,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## BRIEF FOR PETITIONER

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### Opinions Below

There was no opinion announced by the United States District Court for the District of Columbia in denying petitioner's motion to vacate, set aside or correct sentence (R. 8). The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 11-16) is reported at 244 F.2d 763 and at 100 U.S. App. D.C. 315.

### Jurisdiction

The original judgment of the Court of Appeals was entered April 25, 1957 (R. 17) but was subsequently vacated by that Court *sua sponte* (R. 18), and a new judgment was entered June 5, 1957 (R. 18). A motion for leave to proceed

*in forma pauperis* and a petition for writ of certiorari were filed in this Court on July 5, 1957; both the motion and the petition were granted on December 16, 1957 (R. 19). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## Questions Presented

Petitioner was tried, convicted and sentenced to consecutive terms of imprisonment for violation, by a single sale of narcotics, of three separate sections of the Federal narcotics laws. Petitioner's sentence presents two questions to this Court requiring a reconsideration of the decision in *Blockburger* v. *United States*, 284 U.S. 299:

(1) Was petitioner properly subjected to multiple punishment on three different counts arising from a single sale of narcotics in view of the demonstrable Congressional intent that the three separate sections of the Federal narcotics laws were intended only to serve as complementary means for stamping out illegal drug sales?

(2) If the first question is answered affirmatively, then was petitioner subjected to double jeopardy in violation of the Fifth Amendment by his triple punishment for a one-sale violation of three sections of the narcotics laws, all of which are designed to serve the identical social interest and to prevent the identical public evil?

## Constitutional Provision and Statutes Involved

The Fifth Amendment to the United States Constitution provides in part:

> "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . ."

21 U.S.C. 174, derived from section 2 of the Narcotic Drugs Import and Export Act, provided (as of June 24, 1955, the date of the trial court's judgment and commitment):

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this subdivision, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subdivision or in section 7237(a) of the Internal Revenue Code, or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended; section 1, chapter 202 of the Act of May 26, 1922 (42 Stat. 596), as amended; section 12, chapter 553, of the Act of August 2, 1937 (50 Stat. 556), as amended; or

sections 2557 (b) (1) or 2596 of the Internal Revenue Code enacted February 10, 1939 (ch. 2, 53 Stat. 274, 282), as amended. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this subdivision.

"Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

26 U.S.C. 4704(a), derived from section 1 of the Harrison Anti-Narcotic Act, provides:

"It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

26 U.S.C. 4705(a), derived from section 2 of the Harrison Act, provides:

> "It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

26 U.S.C. 7237(a), derived from section 9 of the Harrison Act, provided as of June 24, 1955:

> "Whoever commits an offense or conspires to commit an offense described in subpart C of part I, or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be fined not more than $2,000 and imprisoned not less than 2 or more than 5 years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than 5 or more than 10 years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than 10 or more than 20 years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this subsection, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subsection or in section 2 (c) of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C. 174), or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the act of December 17, 1914 (38 Stat. 789), as amended; section 1, chapter 202, of the act of May 26,

1922 (42 Stat. 596), as amended; section 12, chapter 553, of the act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557 (a) (1) or 2596 of the Internal Revenue Code enacted February 10, 1939 (ch. 2, 53 Stat. 274, 282), as amended. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this subsection."

## Statement

This case arises from the denial of petitioner's motion under 28 U.S.C. § 2255 to vacate, set aside or correct the sentence imposed upon him for violation of the narcotics laws, on the ground that, under the applicable statutes and the Constitution, petitioner has been subjected to multiple punishment for the same offense.

On May 9, 1955, petitioner was indicted in six counts (R. 1-3). Counts 1, 2 and 3, arising from an alleged sale of narcotics by petitioner on February 26, 1955, charged that petitioner sold certain narcotics "not in pursuance of a written order" which is contrary to the requirement of

26 U.S.C. 4705(a)[1] (count 1); that the same narcotics were sold "not in the original stamped package" which is contrary to the requirement of 26 U.S.C. 4704(a) (count 2); and that petitioner "facilitated the concealment and sale" of the same narcotics, which is in violation of 21 U.S.C. 174 (count 3). Counts 4, 5 and 6 related to a second alleged sale of narcotics by petitioner, on February 28, 1955: a violation of the "written order" (count 4), the "original stamped package" (count 5), and the "concealment and sale" (count 6) provisions of the narcotics laws.

At the trial, the principal Government witness, Narcotics Bureau Agent Lewis, testified concerning the sale underlying the first 3 counts as follows (Tr. 3-4):[2]

> "After the introduction we conversed, during which time Gore asked me if I wanted, and I told him I wanted 20 caps of stuff.
>
> "Gore told me that he could let me have 20 caps and quoted me a price of $2.00 per capsule.
>
> "I counted out forty dollars of official Government advance funds and handed it to McKinley Gore who pocketed the money. He left the room, returned with his coat on, and then left the apartment.
>
> "At about 8:15 or 8:30 that same evening, Gore returned to the house and handed me a brown manila envelope containing a number of gelatin capsules which further contained a white powder. Gore told me to count the contents and I counted the contents of the

[1] All United States Code references in this brief are to the current revision of that Code, including the Internal Revenue Code of 1954.

[2] The printed Record does not contain the transcript of proceedings at petitioner's trial. "Tr." references are to the reporter's pagination of the trial transcript. A copy of that transcript and of the transcript of sentencing are being filed with the Clerk.

small manila envelope and found therein to be 20 gelatin capsules containing a white powder."

The same Government agent also testified in similar fashion concerning the sale of narcotics by petitioner on February 28, 1955 which forms the basis of counts 4, 5 and 6 (Tr. 7-8). The agent replied in the negative to the questions whether on February 26th and 28th he had given petitioner a written order for the narcotics purchased and whether they had any revenue stamps on them at the time of purchase (Tr. 10-11).

The trial judge instructed the jury that "the first three counts have reference to the same incident which the Government claims took place on February 26, 1955 and involved the violation of three separate provisions of the United States Code" (Tr. 79). The jury was further instructed that "the law makes it prima facie evidence of a violation" of the 2nd and 5th counts "if there is an absence of appropriate tax paid stamps from any of the aforesaid drugs" (Tr. 84); and that with respect to counts 3 and 6, "possession shall be deemed sufficient evidence to authorize a conviction unless the defendant explains the possession to the satisfaction of the jury" (Tr. 83). The trial judge also instructed the jury as follows (Tr. 83-84):

> "Now, members of the jury, every alleged violation of these laws may constitute an indictable offense, so that a person may be charged with one or more violations of the same law, or a violation of all three laws for one alleged transaction. In other words, the defendant may be found guilty on all three counts, although they involve the same transaction."

After a verdict of guilty on all counts, petitioner was sentenced on June 24, 1955 as follows:

"... that you be confined in an institution to be designated by the Attorney General of the United States for a period of not less than 1 nor more than 5 years, and a fine of $500 be imposed; the fine will be suspended; that said sentence be imposed in each of the six counts of which you were found guilty by a jury; that the sentences under the first three counts will run consecutive with each other, the sentences under the last three counts will run concurrent with each other, and concurrent with the first three counts. So that the total sentence that will be imposed under the narcotics case will be a sentence of not less than 3 nor more than 15 years ..."[3]

Petitioner did not appeal his sentence. On March 21, 1956, however, he filed a motion pursuant to 28 U.S.C. § 2255 to vacate, set aside or correct the sentence as one imposed in violation of pertinent statutes and the Constitution (R. 5-8). The motion was denied on April 11, 1956 (R. 8). The District Court's denial of the motion was affirmed by a panel of the United States Court of Appeals for the District of Columbia Circuit consisting of Judges Bazelon, Fahy and Bastian on April 25, 1957 (R. 11-16). Judge Bazelon and Judge Fahy, by a special concurrence, stated (R. 15-16, footnotes omitted):

"A drug-peddler dispenses to his customers drugs which he has possessed and concealed; he dispenses

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[3] Transcript of sentencing, pp. 4-5. As the transcript of the sentencing and the Record here shows, petitioner had already pleaded guilty to a separate charge of assault with intent to commit robbery (Crim. No. 450-55, R. 9-10) and was sentenced to imprisonment on that charge for two to six years (R. 10-11), the robbery sentence to be served first (R. 5). Petitioner was committed on June 24, 1955 (R. 4, 10) and will therefore, on June 24, 1958, be eligible for parole if the contentions contained in this brief are sustained by the Court.

them without prescriptions on official treasury forms; and he dispenses them not in or from stamped packages. By legislating separately against each component part of the transaction, Congress facilitated the prosecution and conviction of any who ply the illicit trade. It clearly intended that a person against whom any one of the defined phases of a drug-selling transaction is proved should be punished. It does not follow, however, that by providing for a five-year sentence for a violation of any of the statutes, Congress intended that one who performs the entire transaction receive a cumulative sentence of fifteen years. If we were approaching afresh the question whether, in such a case, single or cumulative punishment is the legal course, I think we could not so easily conclude that the consecutive sentences here imposed are authorized. 'It would be self-deceptive to claim that only one answer is possible to our problem.' *United States* v. *Universal Corp.*, 344 U.S. 218, 224 (1952).

"But the question is not one we are at liberty to approach afresh. We are bound by the decision of the Supreme Court in *Blockburger* v. *United States*, 284 U.S. 299 (1932). It may be that the 'same evidence' test which has facilitated the fragmentation of crimes into multiple, separately punishable components is being abandoned in favor of a 'same transaction' test. See *United States* v. *Universal Corp., supra; Bell* v. *United States*, 349 U.S. 81 (1955); *Prince* v. *United States*, —— U.S. ——, 25 U.S. L. Week 4182 (Feb. 25, 1957). Note also the granting of certiorari in cases presenting related problems: *Bartkus* v. *Illinois*, 352 U.S. 907 (1956); *Hoag* v. *New Jersey, ibid.*; and *Ladner* v. *United States, ibid.* Unless we are freed from the controlling effect of *Blockburger*, however, we have no choice but to countenance the sentences here imposed."

On December 16, 1957 this Court granted petitioner's application for leave to proceed *in forma pauperis* and his petition for writ of certiorari (R. 19). On January 6, 1958, this Court appointed counsel to represent petitioner. Counsel have deemed it their responsibility to urge upon the Court a broad reexamination of precedents in the area of multiple punishment and double jeopardy.

## Summary of Argument

### I

Congress has not authorized triple punishment for a single sale of narcotics which simultaneously violates three different sections of the Federal narcotics laws. This Court's decision in *Blockburger* v. *United States*, 284 U.S. 299, permitting multiple punishment for the simultaneous violation of related sections of the narcotics laws was rendered without any discussion of the legislative history of the pertinent statutes up to that date nor was that legislative history presented to the Court for its consideration in the briefs of the parties. A review of the legislative history both prior to and since *Blockburger* reveals no direct evidence of Congressional approval or disapproval, or indeed even of Congressional awareness, of the practice of multiple punishment for the violation by a single sale of related sections of the narcotics laws. The legislative history does, however, provide a mass of indirect evidence establishing that Congress has not authorized the multiple punishment practice here employed.

(1) The legislative history of the pertinent narcotics laws demonstrates a unitary Congressional purpose to outlaw non-medicinal sales of narcotics and to punish only once for a single sale. The debates, discussions and reports in the Congress at the time of the enactment of the Opium Exclusion Act of 1909, the Harrison Act of 1914 and the

Narcotic Drugs Import and Export Act of 1914, which form the basic statutory scheme, demonstrate that Congress pursued therein a single suppressive purpose clearly and explicitly recognized on all sides. Nothing in the subsequent modifications and amendments of the basic statutes reflects any departure from the central and unitary Congressional purpose to prohibit non-medicinal transactions in narcotics.

(2) Further evidence that Congress has not authorized multiple punishment such as has been imposed upon petitioner is found in enactments since *Blockburger*—the Act of August 12, 1937, the Boggs Act of 1951 and the Narcotic Control Act of 1956. In these Acts Congress standardized penalties without regard to the particular provisions violated; it severely increased the minimum and maximum penalties authorized; and it established a first, second and third offender gradation unrelated to the particular offense presently or earlier committed. Congress thus reaffirmed its basic interest in suppressing the illegal sale itself rather than multiplying criminality; it provided a unified system of punishment which is nullified by the arbitrary multiplication of counts whereby a first offender may be punished with the severity reserved for a third offender.

(3) The result in *Blockburger* appears to be premised upon this Court's assertion that the narcotics provisions involved were true revenue provisions rather than laws designed to prohibit non-medicinal sale of narcotics. Had the Court recognized that the narcotic laws were actually aimed at prohibiting sales *qua* sales, it might well have concluded that Congress, in setting up alternative means of apprehending and convicting those who made the forbidden sales, was implementing a single purpose of suppressing the traffic rather than sanctioning triple punishment of the seller merely because he simultaneously committed three

violations. In recent times this Court has increasingly recognized the regulatory and suppressive purpose of the narcotics laws. This new realism in considering the purpose of Congress in enacting the narcotics laws reflects the broadened scope of Congressional authority to prohibit outright commerce which is injurious to the people of the nation. Thus, in determining whether Congress has authorized the harsh multiple punishment practice here involved, ascertainment of the legislative intent cannot be predicated on the strained supposition that Congress sought in the narcotics laws to provide a means of revenue rather than to suppress non-medicinal traffic in narcotics.

(4) A reconsideration and overruling of *Blockburger* is required not only by the legislative history, but also by the rule of lenity adopted by this Court in "unit of prosecution" cases. In recent decisions this Court has repeatedly stated that it will not presume a legislative intent to punish a single course of conduct by multiple convictions unless Congress has strongly indicated a purpose to do so. The rule of lenity applied by this Court in *Universal C. I. T. Corp.* (344 U.S. 218), *Bell* (349 U.S. 81) and *Prince* (352 U.S. 322) is founded upon a reluctance to impose drastic punitive consequences upon an accused in the absence of evidence that the result was clearly intended by Congress. The *Blockburger* decision permits the imposition of drastic punitive consequences based upon mere technicality in multiplying counts. Such grave consequences for the accused as are involved in multiple punishment ought not to depend merely upon the prosecutor's predilections.

(5) The unitary Congressional purpose to suppress non-medicinal narcotics sales is amply and fully served by a single conviction and a single punishment. Furthermore, the construction of the narcotics provisions proposed by petitioner avoids serious constitutional issues otherwise

presented under the double jeopardy provision of the Fifth Amendment. No strained construction of the legislative intent is required to avoid that constitutional issue here, for the legislative intent, on balance, speaks against the practice of multiple punishment.

## II

Petitioner's triple punishment for the simultaneous violation of three sections of the narcotics laws subjected him to double jeopardy in violation of the Fifth Amendment. Before we examine the question whether the offenses of which petitioner was convicted are the "same offence" within the meaning of the constitutional guarantee against double jeopardy, a preliminary question arises which has caused considerable concern in the implementation of the double jeopardy provision—whether the provision precludes double punishment imposed not in successive trials, but as a result of multiple counts joined in a single trial.

(1) The double jeopardy provision precludes double punishment imposed at a single trial. Examination of the contemporaneous history of the Fifth Amendment in the form introduced by Madison in the House of Representatives demonstrates the intention to prohibit double punishment as well as multiple prosecution. This Court's decisions in *Ex Parte Lange* (18 Wall. (85 U.S.) 163), in *In re Snow* (120 U.S. 274), and *United States* v. *Benz* (282 U.S. 304), give unequivocal recognition to the double punishment application of the double jeopardy prohibition. The dictum in *Holiday* v. *Johnston* (313 U.S. 342), which has been cited to the contrary, cannot be so taken in the light of the previous legislative and judicial history. And this Court's subsequent declarations in *In re Bradley* (318 U.S. 50), and *Francis* v. *Resweber* (329 U.S. 459), indicate that there has

been no impairment of the declaration on the House floor in 1789 concerning the double jeopardy provision that "the humane intention of the clause was to prevent more than one punishment."

(2) In determining whether multiple punishment for a single act or transaction violates the double jeopardy guarantee, the "different evidence" formula heretofore applied by this Court should be supplemented by a "distinct evil" or "distinct interest" test of constitutionality. Heretofore this Court has found the answer to the double jeopardy problem presented in cases such as the instant case in the application of a "same essential evidence" test of constitutionality permitting multiple prosecution and punishment so long as some different essential evidence is required for the proof of each offense charged. Both prior to and after *Blockburger*, wherein the same evidence test was reaffirmed, it was subjected to serious criticism by courts and legal scholars. In addition, a notable decision by Mr. Justice Rutledge in 1942, in *District of Columbia* v. *Buckley* (128 F.2d 17), demonstrated the inadequacy of the different evidence test as a measure of the scope of the constitutional guarantee. The American Law Institute's current recommendations disapprove the *Blockburger* result.

A suggested alternative test to measure applicability of the double jeopardy provision—whether the different enactments violated "protect different interests or whether a host of apparently independent offenses has been created in an attempt to catch up with new modes of undermining the same interest"—has been adopted by the United States Court of Military Appeals. The Government, in a brief in this Court, has itself rejected the mechanical different evidence test and has suggested instead the inquiry "whether the difference between the offenses is merely formal or whether each is aimed at a substantially distinct evil."

We respectfully submit that this Court should supplement the different evidence test with an additional test of "distinct interest" or "distinct evil." The different evidence test, a product of archaic rules of criminal pleading, was adopted by this Court without considering that it was designed to alleviate pleading burdens placed upon the prosecution by common law rules long since abandoned. Where the same social interest and the same public evil give rise to separate legislative enactments, the simultaneous violation of both should be deemed but one offense within the meaning of the Fifth Amendment.

(3) Petitioner has been thrice punished for his simultaneous violation of three narcotics statutes all designed to serve the identical social interest and to prevent the identical public evil. The unitary purpose of the statutes involved is to prevent the non-medicinal sale of narcotics and the different provisions are but alternative means of apprehending and punishing the offender. The interest in prevention of narcotics traffic is fully served by permitting apprehension and punishment under any of the statutes; the policy of the double jeopardy clause steps in at that point to preclude triple punishment where, by one act or transaction, the offender has caused only one cognate injury to the state.

Multiple punishment based on the overlapping and proliferated narcotics scheme permits significant disparity in punishment based on no more than the diligence of a prosecutor in multiplying counts. It may easily result in excessive punishment and permits arbitrary treatment of the citizen subject to the untrammeled predilections of a prosecutor. A defendant against whom nothing but a single sale is proved is convicted and punished for violation of three practically indistinguishable narcotics laws designed to protect against a single unlawful result. We urge this

Court to uphold the fundamental purpose of the founders in the application of the Fifth Amendment's double jeopardy prohibition by permitting only one punishment for a transgression resulting in but a single injury to society.

## ARGUMENT

### I

### Congress Has Not Authorized Triple Punishment for a Single Sale of Narcotics Which Simultaneously Violates Three Different Sections of the Federal Narcotics Laws

A. Introduction

Under the first three counts, as well as the second three, petitioner was thrice tried, convicted and consecutively sentenced for the same sale of narcotics. The alleged statutory basis for this result was that the narcotics were: (1) sold without receiving a proper written order from agent Lewis (26 U.S.C. 4705(a)); (2) sold not in or from the original tax stamped package (26 U.S.C. 4704(a)); and (3) concealed and sold after being illegally imported into this country (21 U.S.C. 174). The court below affirmed the conviction on the authority of the 1932 decision in *Blockburger* v. *United States*, 284 U.S. 299. However, a majority of the Court of Appeals in a concurring opinion said, "If we were approaching afresh the question whether, in such a case, single or cumulative punishment is the legal course, I think we could not so easily conclude that the consecutive sentences here imposed are authorized . . . But the question is not one we are at liberty to approach afresh. We are bound by the decision of the Supreme Court in *Blockburger* v. *United States*, 284 U.S. 299 (1932)" (R. 15-16). In this Point I of our brief we urge the Court to overrule *Block-*

*burger* on the ground that it does not properly reflect the intent of Congress.

In *Blockburger*, defendant was convicted on two counts for violations of section 1 and section 2 of the Harrison Anti-Narcotics Act (26 U.S.C. 4704(a) and 4705(a)), respectively, in the course of a single narcotics sale. This Court's decision affirming the conviction on both counts proceeded from the premise that the Harrison Act "is not aimed at sales of the forbidden drugs *qua* sales . . . but at sales of such drugs in violation of the requirements set forth in §§ 1 and 2, enacted as aids to the enforcement of the stamp tax imposed by the act" (284 U.S. at 304; see also, *Id.*, at 302). The Court did not discuss the pre-1932 legislative history of the statute, nor was that history set forth in the briefs of the parties (No. 374, October Term, 1931).

We have reviewed the history of the Federal narcotics laws, both prior and subsequent to 1932, with particular reference to the statutory provisions under which petitioner was convicted and punished. It is a long history, commencing in 1909 and involving a virtually constant course of amendments and revisions of those laws.[4] Yet there is no evidence in the reports and debates which we have read that Congress was ever aware of the practice, at issue here, of fragmenting offenses and multiplying punishments.[5] There is therefore no *direct* evidence of Congressional approval or disapproval of that practice.

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[4] The history is outlined in S. Doc. No. 120, 84th Cong., 2nd Sess., "Laws Controlling Illicit Traffic in Narcotics," pp. 1-14, supplemented by S. Doc. No. 145, 84th Cong., 2d Sess. (addendum), pp. 1-10. The statutes up to 1955 are set forth in *Opium and Narcotic Laws* (Government Printing Office, Wash., 1955).

[5] We do not so construe a passage in S. Rep. No. 1997, accompanying S. 3760, 84th Cong., p. 2, the Senate version of the Narcotic Control Act of 1956, to provide for more effective enforcement

There is, however, a mass of *indirect* evidence establishing that the provisions in question were intended to be and are complementary parts of a legislative scheme to insure that all dealings in narcotics are confined to legitimate medical channels. As such those provisions were intended by Congress to serve as *alternative* means to apprehend the illicit trafficker who sells to drug addicts for profit, not as means to punish more severely a single transaction. The Congressional interest *has* been directed at preventing "the forbidden sales *qua* sales" (284 U.S. at 304) and Congress has not viewed these laws as revenue measures. That Congress did not intend the cumulative application of these laws and multiple punishment for a single transaction is also evidenced by its action in repeatedly amending the narcotics laws to provide sufficiently stringent and deterrent punishment under each

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of the narcotics laws. The passage in question refers to a section of the bill specially punishing importation and subsequent dealings in heroin and we set it forth for the information of the Court:

> "Section 1402 defines and provides penalties apart from the provisions of any other narcotic law for the unlawful importation of heroin or its sale subsequent to the unlawful importation. At present all prosecutions for engaging in such activity are brought under two Federal statutes, the Narcotic Drugs Import and Export Act, and the Harrison Anti-Narcotic Act. These two basic narcotic laws control and regulate every type of narcotic drug, including the newer synthetics.
>
> "This section is designed to supersede the provisions of the Narcotic Drugs Import and Export Act only insofar as they relate to the unlawful importation of heroin or its subsequent sale, and all future prosecutions will be brought under this section with its more stringent penalties. It is not the intention of the committee, either directly or indirectly, to repeal or otherwise make inapplicable to heroin any of the relevant provisions of the Harrison Anti-Narcotic Act."

However, the overlapping coverage of the two laws, as recognized by the report, does not imply their simultaneous application to the same transaction by the prosecutor. The version of section 1402 finally adopted, punishing specially all heroin sales to juveniles, clearly cuts across both the Narcotic Drugs Import and Export Act and the Harrison Act.

penal section standing alone. These conclusions are documented, we believe, by the legislative history discussed in the following sections of this brief.

## B. The Legislative History of the Pertinent Narcotics Laws Demonstrates a Unitary Congressional Purpose to Outlaw Non-medicinal Sales of Narcotics and to Punish Only Once for a Single Sale

1. *A "Glossary" and "Genealogy" of the Statutes and Provisions Involved:* Petitioner was indicted and convicted for violations of three separate provisions of the Federal narcotics laws. Those provisions in turn were derived from two b sic statutes:[6]

(a) *The Harrison Anti-Narcotics Act,* the Act of December 17, 1914, 38 Stat. 785, as amended, requires the registration of all dealers, imposes a special tax on all dealings in narcotics, and punishes violators.

*Counts 2 and 5*

(1) Section 1, now 26 U.S.C. 4704(a), prohibits the purchase or sale, distribution, or dispensation of narcotics except in or from the original tax stamped package.

*Counts 1 and 4*

(2) Section 2, now 26 U.S.C. 4705(a), prohibits the sale, barter, exchange, or giving away of narcotics except in pursuance of a written order of the purchaser, etc., on a form prescribed and issued by the Treasury Department.

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[6] There have been numerous other amendments of the two statutes than those given here and in the following legislative history, but their relevance is at best remote.

(b) *The Narcotic Drugs Import and Export Act* (or "Jones-Miller Act"), formerly the Opium Exclusion Act of 1909, the act of February 9, 1909, 35 Stat. 614, as amended by the acts of January 7, 1914, 38 Stat. 275, May 26, 1922, 42 Stat. 596, and subsequently, prohibits the importation of narcotics except pursuant to regulation and for medical purposes, and punishes violators.

*Counts 3 and 6*

(1) Section 2, 21 U.S.C. 174, prohibits fraudulent or knowing importation of narcotics, or receipt, purchase, sale, or facilitation of concealment or sale, of narcotics known to have been so imported.

Additionally, since 1937 there have been three successive statutes dealing with the punishment of violators of the above statutes and provisions:

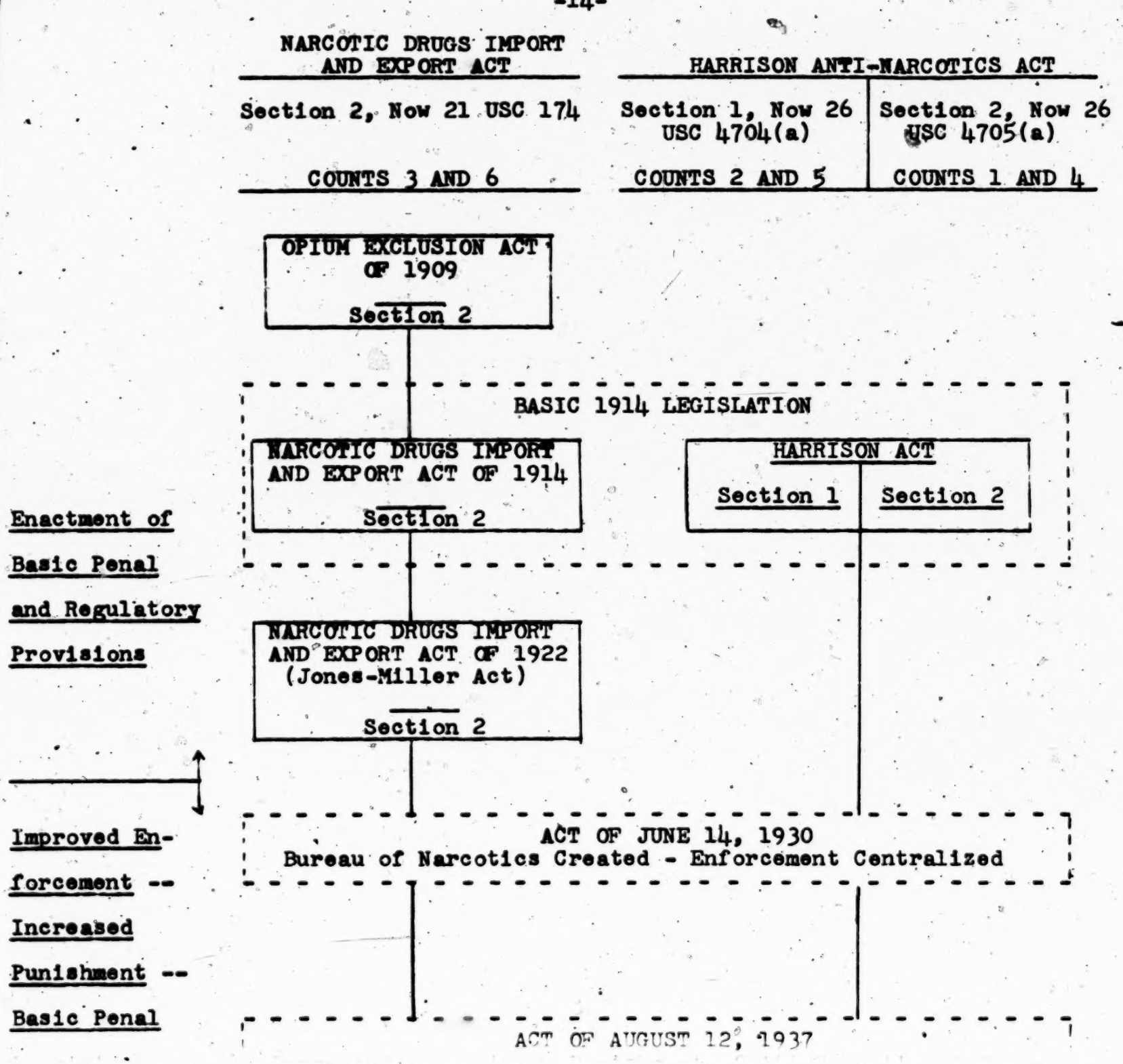
(c) *The Act of August 12, 1937,* 50 Stat. 627, provided uniform and more severe punishment for second and subsequent violators of the above provisions.

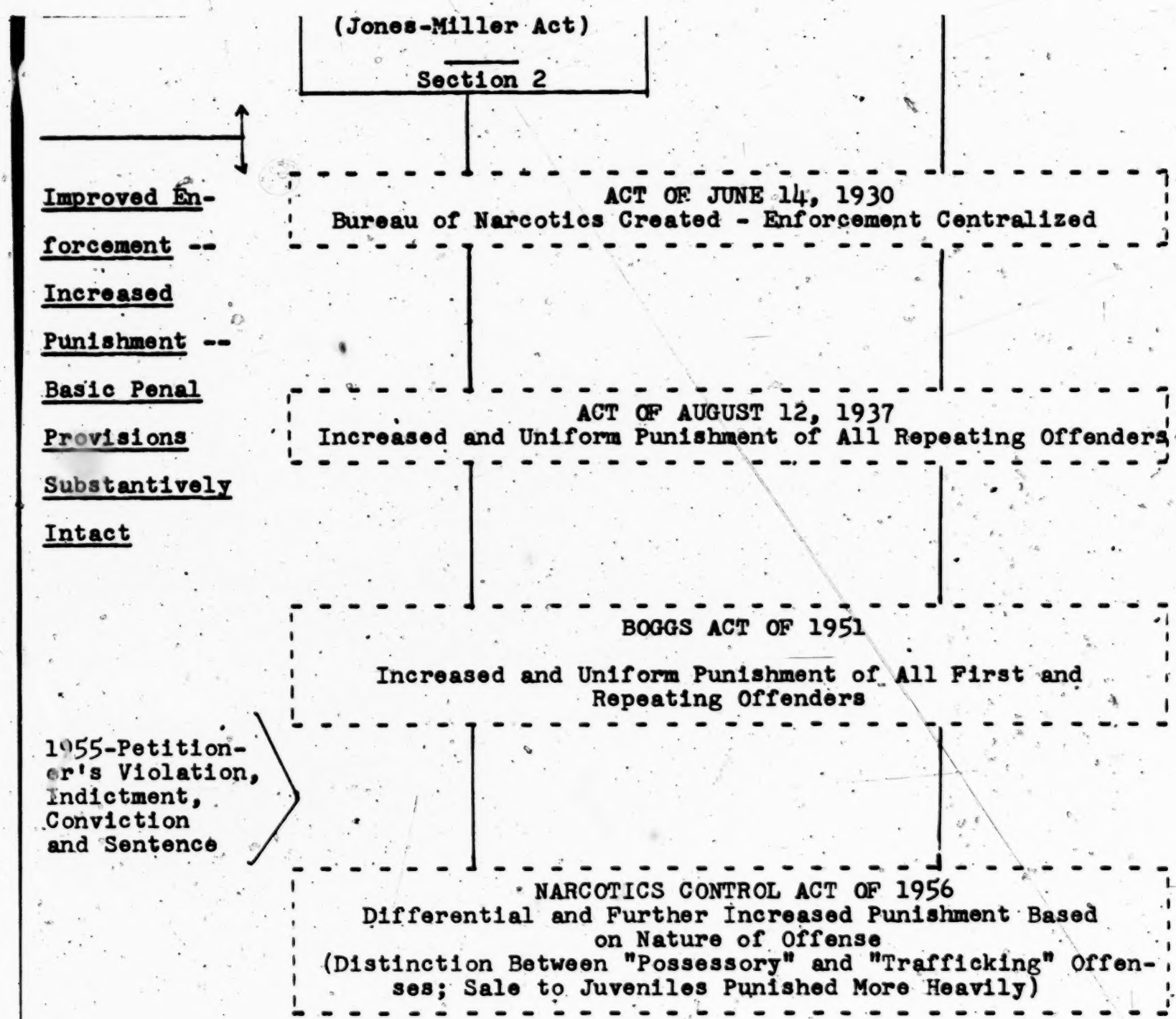
(d) *The Boggs Act of November 2, 1951,* 65 Stat. 767, provided uniform punishment for first as well as subsequent violators of the above provisions, and increased punishment for violators at all levels.

(e) *The Narcotic Control Act of 1956,* the Act of July 18, 1956, 70 Stat. 567, increases and rearranges punishments for various types of violations of the above provisions. [Note: This law was enacted after petitioner's conviction and sentence.]

The following chart may help to explain the genealogy of the above statutes and sections:

(See Opposite) ☞


NARCOTIC DRUGS IMPORT AND EXPORT ACT
Section 2, Now 21 USC 174
COUNTS 3 AND 6
HARRISON ANTI-NARCOTICS ACT
Section 1, Now 26 USC 4704(a)
COUNTS 2 AND 5
Section 2, Now 26 USC 4705(a)
COUNTS 1 AND 4
OPIUM EXCLUSION ACT OF 1909
Section 2
BASIC 1914 LEGISLATION
NARCOTIC DRUGS IMPORT AND EXPORT ACT OF 1914
Section 2
HARRISON ACT
Section 1
Section 2
Enactment of Basic Penal and Regulatory Provisions
NARCOTIC DRUGS IMPORT AND EXPORT ACT OF 1922 (Jones-Miller Act)
Section 2
Improved Enforcement -- Increased Punishment -- Basic Penal
ACT OF JUNE 14, 1930
Bureau of Narcotics Created - Enforcement Centralized
ACT OF AUGUST 12, 1937


(Jones-Miller Act)
Section 2
Improved Enforcement -- Increased Punishment -- Basic Penal Provisions Substantively Intact
ACT OF JUNE 14, 1930
Bureau of Narcotics Created - Enforcement Centralized
ACT OF AUGUST 12, 1937
Increased and Uniform Punishment of All Repeating Offenders
BOGGS ACT OF 1951
Increased and Uniform Punishment of All First and Repeating Offenders
1955-Petitioner's Violation, Indictment, Conviction and Sentence
NARCOTICS CONTROL ACT OF 1956
Differential and Further Increased Punishment Based on Nature of Offense
(Distinction Between "Possessory" and "Trafficking" Offenses; Sale to Juveniles Punished More Heavily)

2. *1909—The Opium Exclusion Act.* While there had been earlier isolated efforts to limit the sale and use of narcotics and particularly opium, it was in the Opium Exclusion Act of February 9, 1909, 35 Stat. 614, that Congress first sought to prevent their sale and use outside of medical channels. That Act prohibited the importation of opium, except for "medicinal" purposes, and punished those who imported, or dealt in illegally imported, opium. The statute of 1909 was the precursor of the present Narcotic Drugs Import and Export Act and section 2 of the 1909 Act was similar, except for penalties and drugs covered by its prohibitions, to the present 21 U.S.C. 174 on which counts 3 and 6 of petitioner's indictment rest.

The 1909 Act made use of the federal power over customs and foreign commerce, and it was enacted in connection with this country's participation in the International Opium Commission Convention in Shanghai in February, 1909 (H. Rep. No. 2003 on H.R. 27427, 60th Cong., p. 2). However, as was conceded by a Senate sponsor of the law, "It is upon its face an effort to suppress the practice of smoking opium and that is clearly a police regulation." 43 Cong. Rec. 1397; see also 43 Cong. Rec. 1396-1400, 1681-4. It was recognized in the House Committee Report on the bill that the price of suppressing the practice would be a considerable loss in revenue, for opium had been subject to a substantial duty:

> "A careful examination of the question, with the information obtained from the State Department, has convinced your committee that the bill ought to pass. If the hopes of the department can be realized, the large loss in the revenues, amounting to nearly a million dollars annually, should not weigh against it" (H. Rep. No. 2003, *supra*, p. 2).

Thus, from early days the Congressional scheme of narcotics control was unrelated, and indeed adverse, to the Federal interest in revenues.

In two other respects, the 1909 Act set the pattern for most subsequent Federal legislation in the field. First, it was enacted under the aegis of international obligations which this country had assumed. Second, it approached the problem of domestic narcotics traffic by indirection, because of prevailing notions of the limits on federal regulatory power. See 43 Cong. Rec. 1396-1400. Rather than prohibit outright all use of narcotics except for legitimate medical and scientific purposes, Congress felt it necessary in effect to license certain kinds of dealings and punish the *absence of a license* in all others. The unitary Congressional purpose to suppress illicit narcotics sales, evidenced in this initial 1909 statute, has continued through the long and complex history of the Federal narcotics laws.

3. *1914—The Harrison Act and other basic legislation.* In 1914, the Sixty-third Congress enacted a series of three laws which, together with the Marihuana Tax Act of 1937, set the basic regulatory pattern of the Federal laws to suppress non-medical narcotics traffic. Again the moving force was our international undertakings, specifically our obligations under the Hague Opium Convention of January 23, 1912.[7] All three bills were sponsored by the Executive

[7] 38 Stat. 1912, 1929. The provisions of that Convention required all signatory powers to enact laws or regulations: for control of the "production and distribution of raw opium" (Art. 1); for "suppression of the manufacture, internal traffic in and use of prepared opium" (Art. 6); to "prohibit the importation and exportation of prepared opium" (Art. 7); to "limit the manufacture, the sale and use of morphine, cocaine and their respective salts (including heroin), to medical and legitimate uses only" (Art. 9); to control by license and authorizations and by registration requirements all use of and commerce in morphine, cocaine and their respective salts (Art. 10); to prohibit their sale to "all non-authorized persons" (Art. 11); and to limit their importation as far as possible (Art. 12).

and enacted by Congress to implement that Convention. See H. Doc. No. 33, 63rd Cong., 1st Sess., pp. 1, 5, 50 Cong. Rec. 283, 285; S. Doc. 957, 63rd Cong., 1st Sess., p. 3; H. Rep. No. 23, 63rd Cong., p. 1; 50 Cong. Rec. 2168, 2192, 2201; 51 Cong. Rec. 13754. Secretary of State Bryan, whose Department had sponsored the legislation, in a report to the President, linked all these bills together as designed to help rid this country and the world of "the opium evil":

> "The passage of the opium exclusion act was the first step which the Congress took to put our own house in order. There were three bills introduced in the last Congress which aim to supplement and perfect that Act. I understand they are to be introduced in the early days of the present session and will be pressed to enactment, thus placing this Government on a rightful position before the world. That is greatly to be desired" (H. Doc. No. 33, *supra*, p. 5, 50 Cong. Rec. 285).

The three bills were H.R. 1966 reenacting the 1909 Opium Exclusion Act as the Narcotic Drugs Import and Export Act and expanding it to include exports and transshipments, 38 Stat. 275; H.R. 1967 to control by taxation the domestic manufacture of opium, 38 Stat. 277; and H.R. 6282, the so-called Harrison Anti-Narcotics Act, by far the most comprehensive measure, to license and regulate by taxation all domestic dealings in opium, cocaine, and preparations containing them, 38 Stat. 785.[2] The joint purpose of the three laws was most fully stated in the House report on the Harrison Act (H. Rep. No. 23, 63rd Cong., to accompany H.R. 6282; the text of that report was also adopted as the text of the Senate report, S. Rep. No. 258, 63rd

[2] The scheme of the Harrison Act was fully noticed by this Court in *Nigro* v. *United States*, 276 U.S. 332, 340 ff., particularly at footnote 1.

Cong.). The report noted at the outset (p. 1) our international obligations assumed under the Hague Convention:

> ". . . Even though there were no real domestic need for such legislation, it would seem, to be logical and to justify its intervention for the settlement of the far eastern opium traffic, that this Government is bound to enact legislation to carry out its humanitarian, moral, and international obligations.
>
> "But there is a real and, one might say, even desperate need of Federal legislation to control our foreign and interstate traffic in habit-forming drugs, and to aid both directly and indirectly the States more effectually to enforce their police laws designed to restrict narcotics to legitimate medical channels."

There had been a huge increase in drug imports and consumption, the report noted, because the absence of federal control undermined state action (pp. 1-3).

The report continued with possibly the clearest statement in the entire legislative history of the unitary Congressional purpose to suppress narcotics sales (p. 3):

> ". . . It is the unanimous view of State, Territorial, and municipal officials charged with police laws aimed at the traffic in narcotics that these laws will remain ineffective to a large extent until the Federal Government acts in support of them.
>
> "It may be said that no individual has ever represented to the Committee on Ways and Means that the present extensive traffic in narcotics should be allowed to continue. The opinion of in fact every one except illicit dealers is that the traffic ought to be greatly diminished, and that *narcotics should be confined to legitimate medical channels. The only question at issue has been how best to do it.* During the past five years the United States Opium Commission has made a thor-

ough canvass of importers, manufacturers, physicians, and State officials, as well as of consumers, and as a result and in conjunction with a committee of representatives of the Department of State, the Treasury Department, and the Department of Justice, *it has been decided by them that only by customs laws and by the exertion of the Federal taxing power can the desired end be accomplished.* In that opinion your committee concur.

"Approaching the question from this point of view, a series of bills has been designed. One of these is already on the statute books—the opium-exclusion act, approved February 9, 1909—and it would now seem to need amendment, in order to secure more certain Federal control of the importation and interstate traffic in narcotics.

"The bill H.R. 6282 provides for that situation." (Emphasis supplied.)[2]

All three measures were thus designed to the same end of eliminating the sale and use of drugs outside of "legitimate medical channels." It was to implement this purpose that Congress provided in the three 1914 statutes for the regulation of those channels themselves.[3]

[2] See also H. Rep. Nos. 22, 24 and S. Rep. Nos. 130, 132, all 63rd Congress.

[3] The debates on H.R. 6282, the Harrison Act, in both houses of Congress were almost entirely taken up with attempts either to strengthen or to relax the regulatory, as opposed to its penal, provisions. The recurring question in the former type of case was whether too much regulation would provoke the opposition of the drug industry and the medical profession and thus bring defeat to a measure all agreed to be necessary, and in the latter case whether the relaxation would leave loopholes for abuse. See 50 Cong. Rec. 2202-11 and 51 Cong. Rec. 9934-38, 13754-62, 13928. Representative Harrison summed up the purpose of the drafters, "to frame a bill which will be practical, which will not be too onerous upon the drug trade, and which still will accomplish the very worthy and laudable purpose of this legislation." 50 Cong. Rec. 2202.

Moreover, the tax features of the two new laws themselves reveal this basic Congressional purpose to suppress non-medicinal narcotics traffic. The tax imposed on the domestic manufacture of opium (H.R. 1967) was freely conceded to be "prohibitive." Representative Harrison, the sponsor and principal Congressional author of the 1914 laws stated:

> ". . . the provisions proposed by this bill will entirely prohibit the manufacture of smoking opium in the United States, and it is the only way I know of that we have the constitutional power to accomplish that purpose" (50 Cong. Rec. 2169).[11]

The tax imposed by the "revenue" provisions of the Harrison Act (H.R. 6282) was likewise designed to suppress illicit narcotics traffic not, as in the case of H.R. 1967, by a "prohibitive" tax but by providing a means of isolating, detecting and punishing unlawful sales. Thus, a proposal to exempt hospitals from the registration requirement of section 1 was rejected because they could easily afford the $1 fee and otherwise some of them might become "drug joints" (50 Cong. Rec. 2204-5). It was recognized from the outset that the cost of administering the law might well exceed its revenues. *Id.*, 2203-4. In fact, the appropriations of the Bureau of Narcotics for the fiscal year ending June 30, 1957, did exceed by nearly $1,350,000, or more than half again, all revenues from its operations during calendar 1956 (*Traffic in Opium and Other Dangerous Drugs for the Year Ended December 31, 1956*, Government Printing Office, Washington: 1957).[12]

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[11] See also remarks of Representative Underwood at 51 Cong. Rec. 1542-3; also 51 Cong. Rec. 1288, and H. Rep. 22, *supra*, p. 2.

[12] See the same report of the Bureau for prior years. The recent hearings of the Subcommittee of the House Committee on Appropriations, "Treasury-Post Office Department Appropriations for 1959," 85th Cong., 2nd Sess., pp. 85-133, were entirely devoted to the Bureau's needs for stamping out illegal traffic. Revenue statistics were not even considered by the Subcommittee.

A concrete example of the disparity between the tax function of the Harrison Act and the punishment provided for its violation is presented in this case. The price of the printed order forms required to be used by all purchasers other than doctors' patients, was set at one cent each in order to pay the cost of their printing (50 Cong. Rec. 2203; see 26 U.S.C. 4705(f)). The failure of petitioner to secure a proper written order for each sale to Agent Lewis is the basis of counts 1 and 4 of the indictment. The stamp tax, which is the basis of counts 2 and 5 of the indictment, is at the rate of one cent per ounce or packaged fraction of an ounce (26 U.S.C. 4701), and the 63.2 grains of heroin plus 4 grains of cocaine sold by petitioner barely exceed one-eighth of an ounce.

At the time of its passage in the House the Harrison Act was presented by its author as "the third and last one of this series of bills attempting to control and regulate the traffic in narcotics, and in some particulars it is of more importance to the people of the United States than either of the two other bills which have just been passed by the House" (50 Cong. Rec. 2201). In the Senate it was described as a bill ". . . to control the use of drugs such as opiates and cocaine . . ." (51 Cong. Rec. 9938), and concerted efforts were made in both houses to delete the exemption provided for prepared and patent medicines containing only minor percentages of narcotics (50 Cong. Rec. 2209-11; 51 Cong. Rec. 9938, 13759-62; see 26 U.S.C. 4702). The final concern of the House proponents of the measure was whether the bill, as amended by the Senate and after conference, "will be so framed as to literally, if possible, suppress the traffic, but at the same time protect [legitimate medical practice], as far as possible" (51 Cong. Rec. 13928).

In sum, the single suppressive purpose of the 1914 basic narcotics legislation was expressly recognized on all

sides and was clearly reflected in the regulatory and tax provisions of the laws. Nothing in the subsequent modifications and amendments of these basic statutes reflected any departure from the central Congressional purpose to prohibit non-medicinal transactions in narcotics. On the contrary, subsequent enactments simply emphasized this basic purpose.[13]

4. *Post-Blockburger Statutes.* In the period after the *Blockburger* decision, Congress enacted three major laws to increase and correlate punishments for violators of the criminal provisions of the narcotics laws: The Act of August 12, 1937, 50 Stat. 627, the Boggs Act of November 2, 1951, 65 Stat. 767, and the Narcotic Control Act of 1956,

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[13] The principal legislation in this area between 1914 and 1937 was the creation in 1922 of a separate Narcotics Control Board to control imports and exports in narcotics, as part of a general reenactment of the Narcotic Drugs Import and Export Act (42 Stat. 596). House Report No. 852, 67th Cong., accompanying the bill (H.R. 2193) noted (p. 3) that "The Federal Control of narcotic drugs and enforcement of the provisions of the International Opium Convention of 1912 are not accomplished by any one Act, but are the results of several complementary Federal statutes." Thus, the newly strengthened import restrictions

> ". . . *will also aid in preventing evasions of the Harrison Act*, by means of the unlawful importation into this country of narcotic drugs previously imported by us and sent into the export trade, and will close the legitimate domestic market to foreign manufacturers. By proper action in authorizing the importation of the raw products, it is believed that the three Secretaries can curb any tendency to increase the price of the manufactured narcotic drugs which might otherwise result from the prohibition of their importation, and by such action also take account of increased domestic consumption beyond the ordinary needs for medical and scientific uses, due either to diversion of drugs into illegitimate channels in violation of the Harrison Act, or to epidemic or war conditions. . ." (Id., pp. 7-8. Emphasis supplied). See also 62 Cong. Rec. 6334, 6335, 6341, 6834.

In 1930 the Federal Bureau of Narcotics was created and the principal enforcement authority over domestic dealings in narcotics was vested in the Bureau (46 Stat. 585).

July 18, 1956, 70 Stat. 567. All three laws considered together provide powerful evidence that Congress undoubtedly intended to punish drug peddlers surely and severely, but, in the words of the concurring opinion below, it was providing "for the composite act of drug-peddling, not for the separate counts into which a prosecutor's ingenuity could divide it" (R. 15-16, n. 1).

First the laws incorporate the idea of punishing repeating offenders more severely than first offenders and at the same time they seek greater uniformity of punishment for persons convicted of illicit trafficking. While the 1956 Act would punish certain offenses more seriously than others, the basis for differentiation is not the failure to secure tax stamps or a written order, but rather the more or less aggravated nature of the trafficking involved and the consequent danger to the public. The increase in penalties, including death in certain cases, also demonstrates beyond all doubt that the narcotics laws are not really concerned with revenue at all, but rather with illicit traffic, since it seems clear that Congress would not authorize the death sentence, as it now has, as punishment for tax or customs evaders as such. Second, the post-1937 laws define different limits of punishment for first, second and subsequent offenders. They therefore contradict the notion that a first offender, such as petitioner, may, through the device of fragmenting his single sale into three crimes, be punished by a sentence as great as, or greater than, that reserved by Congress for a repeating violator.[14] Third,

[14] This point is well illustrated in the case at bar. Petitioner was sentenced for the single sale to a maximum imprisonment of 15 years. This was greater than the Boggs Act of November 21, 1951 permitted not only in the case of first offenders (5 year maximum) but also in the case of second offenders (10 year maximum). We have printed in Appendix B an official letter written by former United States Attorney Rover which we understand to contain the Department of Justice's rationalization of

for purposes of counting previous offenses, Congress has lumped together all Federal narcotics violations regardless of their statutory basis, thereby indicating the absence of intrinsic importance in the different provisions except as alternative methods of suppressing illegal sales. Finally, the drastic increase in criminal penalties leaves it transparently clear that Congress intended a single punishment to suffice.

(i) *The Act of August 12, 1937* inaugurated the practice of providing heavier penalties for second and third offenders and provided punishments up to 20 years and $10,000 in the case of third offenders. The 1937 Act recognized the unitary purpose of the penal provisions violated by petitioner by treating identically for purposes of punishment all second offenders and all third offenders "convicted of selling, importing, or exporting, or conspiring to sell, import, or export [opium, cocaine, or their derivatives] . . . in violation of the laws of the United States . . ." (50 Stat. 627), without regard to which particular law was used to secure their conviction. Second and third offenders were thus to be punished with the same severity regardless of which law they violated in committing the second or third offense. Furthermore, second and third offenders were to be punished with the same severity regardless of which law they had violated in their previous offense or offenses. What Congress did here was to lump together and give the same weight to the various penal provisions aimed at suppressing illegal narcotics sales. Congress thus once again discounted any distinction between the various provisions of the narcotics laws and re-

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this treatment. Although the letter states that the Department of Justice is treating the single-sale-multiple-violator as a first offender, the penalties he receives, as we have just shown, make it clear that he is given more severe punishment than a first offender properly can be given under the Boggs Act.

emphasized instead the underlying violation which is the focus of all of the narcotics provisions.[15]

(ii) *The Boggs Act of 1951,* (H.R. 3490, 82nd Cong.), 65 Stat. 767 went even farther in this direction of lumping the several laws together "in order to provide greater uniformity for serious violations of those laws" (H. Rep. No. 635, 82nd Cong., p. 2). The same punishment was now provided at every stage, including first offenses, for violations of sections 1 and 2 of the Harrison Act and of section 2 of the Import and Export Act and the punishment for repeating offenders was increased:

> First offenders: Two to five years and up to $2,000.
>
> Second offenders: Five to ten years and up to $2,000.
>
> Third or subsequent offenders: Ten to twenty years and up to $2,000.[16]

Representative Boggs explained that, "At the present time, two separate laws deal with the subject of narcotics . . . . H.R. 3490, the bill now under consideration, would provide the same penalties for violations of the tax laws and the Narcotic Drugs Import and Export Act relating to narcotic drugs and marijuana as well" (97 Cong. Rec. 8196; see also H. Rep. No. 635, *supra*, p. 1; and S. Rep. No. 1051, 82nd Cong., p. 1).

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[15] See statement by the Senate Manager of the Bill (S. 2388, 75th Cong.), 81 Cong. Rec. 8380; H. Rep. No. 1122 on H.R. 6283, 75th Cong., pp. 2-3; S. Rep. No. 883 on S. 2388, 75th Cong.

[16] In contrast to the increased mandatory prison sentences, Congress left fines discretionary because it was informed that they had little deterrent effect. See, *e.g.*, S. Rep. No. 1997, 84th Cong., pp. 17-18. In the Boggs Act permissible fines were actually decreased. In the 1956 Act they were increased, but complete discretion as to their imposition was left with the trial judge. Thus, Congressional disinterest in revenue was again manifested.

The House debates on the Boggs Act showed the continuing concern of Congress to suppress the narcotics trade by all weapons at hand. It was objected in those debates that the bill made no distinction between narcotics peddlers and mere addicts; the author of the bill replied (97 Cong. Rec. 8206):

> "Mr. Boggs: The gentleman knows that this legislation has been very carefully considered. The gentleman further knows that it is not the intention of this legislation to affect a teen-ager or any such person who has possession of narcotics. But the gentleman also knows that if we try to make a distinction between possession and peddling that we immediately open the law to all types of abuses. In the existing legislation, which has been the law for many, many years, there is no distinction between possession and peddling, even now.
>
> "Mr. Simpson: I know that the intention of this law, and I am very sincere, is to catch the peddler, but I say in passing this law we go far beyond that.
>
> "Mr. Boggs: The peddler, the importer, the commercial dealer."

It had been this same concern over possible loopholes for illegal drug sales that had led to the overlapping and complex structure of the original Harrison Act. See, e.g., n. 10, *supra*.

The Boggs Act was in effect at the time of petitioner's indictment and conviction in 1955. The Act itself and its history both argue strongly against the fragmentation of illegal sales to produce multiple punishment. First, Congress prescribed minimum penalties, including denial of probation or suspension of sentence, for repeating offenders. It thereby insured what it deemed sufficient pun-

ishment of a seller for any violation. Second, it also prescribed maximum penalties for each group of violators. It thereby insured against punishing the first offender as severely as the second. Presumably it did not contemplate evasion of that principle by the device of fragmenting sales into multiple counts, for Congress expressly aimed at the illegal "peddler" as such, and it made no distinctions based upon the particular provision of law violated. Congress evidenced its concern with the general offense of trafficking, rather than with the particular statutory omission used as the basis of arrest and punishment. This was not only stated explicitly in the debates and reports (97 Cong. Rec. 8196, H. Rep. No. 635, S. Rep. No. 1051, *supra*), but Congress enacted severe penalties and provided that all offenses should be weighed equally against the first offender and the repeating offender regardless of which provision he had violated. There is no basis for believing, therefore, that Congress intended such distinctions to serve as a basis for slicing up the crime of "peddling" and thus exceeding the maximum penalty imposed upon the "peddler." The clear inference is to the contrary.

(iii) *The Narcotic Control Act of 1956*, 70 Stat. 567. This statute, enacted after petitioner's violation, conviction and sentence, represents a third modern revision of the penal aspects of the narcotics laws. Like the 1937 Act and the Boggs Act, it is exclusively directed to criminal enforcement matters, but it is more comprehensive in form than either of the earlier Acts. Moreover, the 1956 Act embodies the first Congressional effort to differentiate punishment in terms of the nature of the illicit transaction and the accused's role in it.

A new paragraph was added to section 2 of the Import and Export Act, 21 U.S.C. 174, specifically punishing sales of heroin to juveniles by imprisonment from ten years to

life[17] *or by death* if recommended by the jury (section 107 of the Act of July 18, 1956, 70 Stat. 571). This provision was based on Congressional sentiment that this was the most vicious form of traffic (S. Rep. No. 1997 on S. 3760, 84th Cong.; 102 Cong. Rec. 12123). First and subsequent offenders under this provision were all to be treated alike.[18]

Next in seriousness are so-called "sale offenses and conspiracies to commit sale offenses" involving juveniles, other than heroin sales, in violation of section 2 of the Harrison Act, 26 U.S.C. 4705(a) (section 103(b), 70 Stat. 568-9). In such cases all offenders, regardless of their prior record, are subject to ten to forty years imprisonment, plus fine. Next come persons guilty of "sale offenses and conspiracies to commit such offenses" not involving juveniles; they are to be punished less severely *unless* they are second or subsequent offenders (*Ibid.*). Similar punishment is provided for violators of 21 U.S.C. 174, unless they come under the above-noted provision forbidding sales of heroin to minors (sections 105, 106, 70 Stat. 570-1). Finally, all other violators of the Harrison Act, including violators of section 1 of the Harrison Act, are lumped together for lesser punishment under section 103(a), 70 Stat. 568.

The 1956 Act, then, represents a new departure in the Federal attempt to suppress illicit drug traffic. It not only singles out the peddler of drugs to minors, but it also distinguishes between addicts or "possessors" on the one hand and sellers or "traffickers" on the other. (H. Rep. No. 2388, to accompany H.R. 11619, 84th Cong., pp. 2, 63-65; 102 Cong. Rec. 10687-8, 12165-6.) Thus, House Re-

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[17] Importation of heroin had been made illegal in 1924 (43 Stat. 657) and now a separate provision of the 1956 Act provided for surrender of all heroin remaining in the United States (70 Stat. 572, 18 U.S.C. 1402).

[18] All fines were made discretionary and not to exceed $20,000 for any offense. See n. 16, *supra*.

port No. 2388, *supra*, summarized the basic punishment scheme in the following terms (p. 2):

> "*Penalty provisions.*—The penalty provisions of the Internal Revenue Code of 1954 applicable to narcotic drugs and marihuana would be amended so as to increase the mandatory minimum sentence in the case of the trafficker and increase the permissive maximum sentence in the case of both the possessor and the trafficker. At the present time all first offenders are subject to a minimum mandatory sentence of 2 years and a permissive maximum of 5 years; all second offenders, 5 to 10 years; and all third and subsequent offenders, 10 to 20 years. For the trafficker, the penalties would be made a mandatory minimum of 5 years for the first offense and a permissive maximum of 20 years; and for second and subsequent offenses the mandatory minimum would be 10 years with a permissive maximum of 40 years. For sale offenses and conspiracies to commit sale offenses by an adult with respect to a juvenile (under age 18) the bill provides a mandatory minimum sentence of 10 years and a maximum permissive sentence of 40 years. The narcotic or marihuana possessor, as distinguished from the trafficker, would continue to be subject to the present minimum mandatory sentences but would be subject to permissive maximum sentences of 10, 20, and 40 years for first, second, third, and subsequent offenses, respectively. There would be a prohibition on the granting of probation, suspension of sentence, or parole with respect to any of the increased penalties applicable to traffickers. These mitigations of sentences would continue to be available in the case of the first offender possessor. The mandatory fine of not to exceed $2,000 for all narcotic drug and marihuana law

violations would be made discretionary with the maximum limit increased to $20,000." [19]

The new dichotomy between the "trafficker" and the "possessor" was engrafted upon the unchanged language of the 1914 penal provisions. One who sells without receiving a proper written order, in violation of section 2 of the Harrison Act, 26 U.S.C. 4705(a), or who sells illegally imported drugs in violation of 21 U.S.C. 174, is now punishable twice as severely as the man who sells or purchases drugs which are not properly tax stamped in violation of section 1 of the Harrison Act, 26 U.S.C. 4704(a). Although Congress appears on its face to have reversed its earlier action in the Boggs Act and to have created different penalties for the violation of the different sections here involved, the explanation seems clearly to have been Congress' effort to distinguish between the trafficker and the possessor or addict. The resulting distinction in penalties provided for the separate provisions of the narcotics law thus reflects that distinction rather than any Congressional effort to give independent significance to the statute used to apprehend and convict the violator.

Indeed, all the evidence from the 1956 Act indicates a Congressional intention to punish severely *but once only* for each illegal sale. For example, heroin sales to juveniles may be punished by life imprisonment or even death, with no probation or suspension of sentence. Plainly Congress felt that that was enough and that the inevitable failure to secure a tax stamp or a written order for an illegal drug sale was no basis for additional punishment. To emphasize the illegality of all heroin sales it outlawed the

[19] See also H. Conf. Rep. No. 2546, 84th Cong., 102 Cong. Rec. 12163-4.

drug completely (section 201 of the 1956 Act, 70 Stat. 572, 18 U.S.C. 1402); outlawry served not only to minimize the dangers of heroin sales but also to facilitate apprehension and punishment of the seller. But it was nowhere suggested that the fact that the outlawed drug could neither be imported, stamped, or ordered in writing should be the basis of *three* automatic convictions in the case of every sale. The severe penalties provided in the 1956 Act for single violations, and the careful distinctions made by Congress between different forms of traffic, repel that conclusion.

That Congress was not approving the prosecutor's practice of trebling punishment by fragmentation of the offense is further suggested by the recurring recognition that the increased penalties provided by the 1956 Act were fully adequate[20] (see H. Rep. No. 2388, *supra*, pp. 2, 4-5, 10-12, 63-65; S. Rep. No. 1997, *supra*, pp. 5-7; House debates, 102 Cong. Rec. 10687-90, 12165, 12167; Senate debates, 102 Cong. Rec. 12123). Representative Cooper, the House manager, stated after the Act had passed the House that "The penalties are appropriate to assure that the convicted trafficker gets just treatment for his evil act" (102 Cong. Rec. 12167). That view was recently echoed by the Commissioner of Narcotics: "On the whole, the 1956 control act is as good as anything you could get. I don't think you could ask for anything better" (Hearings before the Subcommittee of the House of Representatives Committee on Appropriations, "Treasury-Post Office De-

[20] The statute also contained procedural provisions facilitating detection and conviction of violators, and a new provision, section 201, 70 Stat. 573, 18 U.S.C. 1403 punishing the use of mails, radio, telephone or other communication facilities in the course of narcotics traffic.

partment Appropriations for 1959," 85th Cong., 2nd Sess., p. 103).[21]

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In sum, the 1937, 1951 and 1956 Acts, enacted after *Blockburger*, all speak strongly, if indirectly, against the practice of multiplying counts against the perpetrator of a single sale. In providing standardized penalties without regard to the particular section violated, in severely increasing the minimum and maximum penalties authorized, and in establishing a first, second and third-offender gradation unrelated to the offense then or earlier committed, Congress reaffirmed its basic interest in suppressing the illegal sale itself. It provided a unified system of punishment which is nullified by arbitrary multiplication of counts arising from a single sale, whereby a first offender is punished as severely as a third offender.

C. The Legislative History Before and After *Blockburger* Requires a Reconsideration of That Decision

This Court in *Blockburger* upheld double conviction and punishment for a single illegal narcotics sale, finding that sections 1 and 2 of the Harrison Act each required "proof of a different fact which the other does not" (284 U.S. at 304)—lack of a tax stamp in one case and lack of a proper written order in the other. This result was premised upon the Court's belief that Congress had not aimed directly at narcotics sales, for the Court stated:

> "The statute is not aimed at sales of the forbidden drugs *qua* sales, a matter entirely beyond the authority

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[21] Commissioner Anslinger also noted that traffickers "cannot stand" the mandatory minimum sentences (Id., p. 104), and that the Bureau of Narcotics concentrated principally on larger traffickers, leaving the possessory offenses to local police (Id., pp. 105-6).

of Congress, but at sales of such drugs in violation of the requirements set forth in §§ 1 and 2, enacted as aids to the enforcement of the stamp tax imposed by the act. See Alston v. United States, 274 U.S. 289, 294; Nigro v. United States, 276 U.S. 332, 341, 345, 351." (*Ibid.*)

Thus, it appears likely that if the Court had found the statute aimed at narcotics sales as such, or at "trafficking" as it has come to be called, the two counts would have charged only one offense, not two, and one of the two convictions and sentences would have been invalid. Had the Court recognized, as we have shown, that the narcotics laws *were* aimed at prohibiting sales *qua* sales, it would have been forced to conclude that Congress, in setting up alternative means of apprehending and convicting those who made the forbidden sales, was implementing a single purpose of suppressing the traffic rather than sanctioning triple punishment of the seller merely because he simultaneously committed three technical violations. We respectfully submit that that *is* precisely the conclusion to be drawn from the history of the narcotics laws, both prior and subsequent to *Blockburger*, which we have just reviewed, and that the contrary conclusion drawn by the Court in the absence of a review of this legislative history was erroneous.

The statement in *Blockburger* that the Harrison Act's penal provisions were aids to enforcement of the stamp tax was based on prior decisions in which the Act's constitutionality had been challenged on the ground that its purpose was to effect regulation and restraint under the guise of a tax measure. See *Alston v. United States*, 274 U.S. 289, and *Nigro v. United States*, 276 U.S. 332, particularly at 339, 341, 351-4. In *Nigro*, 276 U.S. at 341, the

Court had said, "In interpreting the Act, we must assume that it is a taxing measure, for otherwise it would be no law at all." In more recent times, however, the Court has increasingly recognized the regulatory and suppressive purpose of the narcotics laws.[22] This new realism in considering the purposes of Congress in enacting the narcotics laws was made possible by this Court's decisions in other fields broadening the scope of Congressional authority to prohibit outright commerce injurious to the people of the nation. See, e.g., *United States* v. *Darby*, 312 U.S. 100; *Mulford* v. *Smith*, 307 U.S. 38.

It may be that even at the time that *Alston*, *Nigro* and *Blackburger* were decided this Court took an unnecessarily narrow view of the Congressional power to prohibit narcotics trafficking since narcotics laws were enacted to carry out treaty obligations of the United States. *Cf.*, *Missouri* v. *Holland*, 252 U.S. 416. At any rate, this Court no longer deems it necessary in order to uphold Federal tax laws to refuse to recognize whatever regulatory or prohibitive purposes such laws may have. See *United States* v. *Kahriger*, 345 U.S. 22; *United States* v. *Sanchez*, 340 U.S. 42. Certainly, in determining whether Congress has authorized the harsh multiple punishment practice to which petitioner has been subjected, ascertainment of the legislative intent cannot today be predicated on the unnecessary and incorrect supposition that Congress sought in the narcotics laws to provide a means of revenue rather than to suppress

[22] See, e.g. *United States* v. *Sanchez*, 340 U.S. 42; *United States* v. *Kahriger*, 345 U.S. 22, 27, 30; *Direct Sales Co.* v. *United States*, 319 U.S. 703, 710. "Gangsters, not hunters or small boys, comprise the normal private market for machine guns. So drug addicts furnish the normal outlet for morphine which gets outside the restricted channels of legitimate trade." Earlier cases recognizing this basic purpose of the law include *United States* v. *Balint*, 258 U.S. 250, 253, 254 (per Taft, C.J.), and *United States* v. *Behrman*, 258 U.S. 280, 288, 289.

the non-medicinal traffic in narcotics. The narcotics laws do aim at narcotics sales outside of legitimate medical channels *qua* sales. That is their purpose, and the various penal provisions of these laws, repeatedly strengthened by Congress, are merely alternative means to apprehend the illicit seller so that he may be brought to justice and the illegal traffic thereby suppressed.

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Unquestionably Congress intended to punish severely and thus stamp out every phase of the narcotics traffic, regardless of its form or milieu. Because that was its principal concern, the penal provisions overlap in their coverage. It does not follow, however, that Congress intended to punish the illicit seller cumulatively in as many ways as he could be caught, or that he might be punished thrice simply because he could be arrested and charged on three separate grounds. The concurring majority of the court below made the very same point (R. 15):

> "A drug peddler dispenses to his customers drugs which he has possessed and concealed; he dispenses them without prescriptions on official treasury forms; and he dispenses them not in or from stamped packages. By legislating separately against each component part of the transaction, Congress facilitated the prosecution and conviction of any who ply the illicit trade. It clearly intended that a person against whom any one of the defined phases of a drug selling transaction is proved should be punished. It does not follow, however, that by providing for a five-year sentence for a violation of any of the statutes, Congress intended that one who performs the entire transaction receive a cumulative sentence of fifteen years."

"It does not follow" first of all, because Congress has never placed any intrinsic importance upon the various revenue aspects of the narcotics laws; they were intended to serve and do serve merely as means for bringing the trafficker to justice, with punishment to follow inexorably. The punishment provided is grossly disproportionate to the purely minimal revenue involved; in any event the revenue features of the narcotics laws are generally inapplicable to illegal trafficking.[3] This becomes clear when it is recognized that it is impossible to secure tax stamps for drugs which are illegally imported and that it is impossible to secure written order forms for purchases for illicit non-medicinal use. Petitioner was forbidden by law from obtaining either the tax stamp or the Treasury form for whose absence he was convicted—nothing could make clearer the punitive as distinct from the revenue function of these penal provisions. Moreover, the very severity of the penalties provided for narcotics law violations confirms the fact that punishment is imposed without regard to the tax and customs features of those laws. Congress aimed at something far more serious than the loss of a purely nominal source of revenues.[4]

[3] The stamp tax is imposed upon the importer or producer, not the seller, and is one cent per ounce or packaged fraction of an ounce. 26 U.S.C. 4701. All together petitioner was charged with selling less than a seventh of an ounce in the course of two different sales. But, of course, if the heroin had been presented for tax stamping it would have been confiscated instead. 26 U.S.C. 4733. Petitioner was not eligible to register and pay the license tax and therefore was not eligible to purchase written order forms. See U. S. Treasury Department, Narcotic Internal Revenue "Regulations No. 5" (G.P.O., Washington, 1957). Finally, the drug could not have been validly imported and was therefore not dutiable. See 21 U.S.C. 173.

[4] It is noteworthy, of course, that the Harrison Act contains a special punishment section, 26 U.S.C. 7237, whereas the penalties for criminal violation of the Internal Revenue Code generally are the far smaller ones contained in 26 U.S.C. 7201-14.

We respectfully suggest to the Court that the *Blockburger* decision was occasioned by the then narrow view of Congressional power and by the failure of the Court to have the benefit of the legislative history up to that time and, of course, of the subsequent legislative history. We respectfully submit that this history requires a reconsideration of the Court's decision in *Blockburger* and, applying the rule of lenity recently adopted by this Court in a related area, requires the overruling of that decision. We turn now to the cases involving the rule of lenity.

D. Single Punishment for a Single Sale of Narcotics Is in Accord With the Rule of Lenity Adopted by This Court in "Unit of Prosecution" Cases

In recent decisions this Court has repeatedly stated that it will not presume a legislative intent to punish a single course of conduct by multiple penalties unless Congress has strongly indicated a purpose to do so. See *United States* v. *Universal C.I.T. Corp.*, 344 U.S. 218; *Bell* v. *United States*, 349 U.S. 81; *Prince* v. *United States*, 352 U.S. 322. Those cases all involved the question of multiple punishment of a single course of conduct under the *same* statutory provision (see *United States* v. *Universal C.I.T. Corp.*, 344 U.S. at 321, n. 4), and in each opinion the Court noted that it was construing a specific statute (see, e.g., *Prince* v. *United States*, 352 U.S. at 325, text at n. 4). However, the doctrine of lenity announced in those decisions (see *Bell* v. *United States*, 349 U.S. at 83) proceeds upon general principles which are equally applicable here.

The *Universal C.I.T.* case involved multiple counts charging violations of sections 6, 7 and 11 of the Fair Labor Standards Act (29 U.S.C. 206, 207, 211), based upon violations of the statute simultaneously involving a number of different employees. In reviewing the history of the

provisions involved, the Court started from the premise that:

> ". . . when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication" (344 U.S. at 221-2).

Among the evidence which the Court found persuasive of a Congressional intent not to multiply punishment were two factors also present here, namely, a drastic increase by Congress in the punishment originally prescribed for violations of the Act and a consolidation of the punishment provisions of the Act (344 U.S. at 222-3). Finally, this Court noted that a resolution of the issue against multiple punishment does not prevent the prosecutor from drafting his indictment in alternative or multifarious form in order to avoid fatal variance of the evidence, so long as the accused is convicted and punished for only one crime (344 U.S. at 225).

In *Bell*, the indictment charged two distinct violations of the Mann Act, 18 U.S.C. 2421, for the simultaneous transportation of two women in interstate commerce for immoral purposes, and the question was whether Congress had intended that treatment. Again the Court noted that Congress might easily have expressed a desire "to make each stick in a faggot a single criminal unit" (349 U.S. at 83), but it had failed to do so in any conclusive fashion. The problem was therefore left to the judiciary and, "It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of harsher punishment" (*Ibid.*). The Court in

*Bell* found a virtual absence of evidence suggesting that Congress intended either one result or the other. In the case at bar there is a mass of evidence, indirect though it be, that Congress did not intend to sanction multiple or "harsher" punishment.

*Prince* v. *United States, supra,* strikes closest to this case. There the indictment sought to punish petitioner separately for entering a bank with intent to rob and for committing the robbery, that is, for beginning the robbery and for completing it. The disjunctive phrasing of the bank robbery statute, 18 U.S.C. 2113, was due to a 1937 amendment suggested by the Attorney General in order to cover cases where the attempt was made but failed, but no separate penalty clause had been added at the time of amendment. The Court noted:

> "It was manifestly the purpose of Congress to establish lesser offenses. But in doing so there was no indication that Congress intended also to pyramid the penalties" (352 U.S. at 327).

The Court noted that "pyramiding" of penalties might result in punishment of 40 or even 50 years imprisonment for the same robbery, whereas the statute specified a maximum of 20 years for the robbery itself. As for the Government's suggestion that each phase of the act (entry and then robbery) should be treated as a separate offense, the Court stated (352 U.S. at 327): "It is unnecessary to do so in order to vindicate the apparent purpose of the amendment", and held that the offense of entering the bank with intent to rob it was merged in the major offense of actually committing the robbery.[25]

[25] The doctrine of "merger of offenses" applied in *Prince* is particularly appropriate under the Narcotic Control Act of 1956 where Congress singled out certain kinds of trafficking for particu-

Just as in *Prince*, it is unnecessary here to treat the various aspects of an illegal drug sale as separate offenses "in order to vindicate the apparent purpose" of the narcotics laws. The Harrison Act was enacted to fortify and extend the prohibitions of the 1909 Opium Exclusion Act, and thereby to further implement our national purpose to stamp out drug-peddling and addiction. The crime at which all the provisions here involved strike is trafficking in narcotics—their sale and use for non-medical purposes. Both statutes have been repeatedly supplemented and amended to that same end. But they are, and always have been, part of the same legislative program aimed at a single vice.

If narcotics are illegally imported they inevitably go unstamped and their sale is invariably illicit. No further purpose is served by applying three penal statutes where one will suffice, unless it be to facilitate the apprehension and prosecution of the violator. But once arrested and brought to justice, he is entitled to be free from redundant punishment secured by ringing technical changes on the same basic injury to the public interest. At least three courts of appeals, including the court below (R. 16), have intimated that if they were freed from the controlling effect of *Blockburger*, they might well reach a result permitting only a single punishment where but a single criminal transgression is alleged.[26] Prior to *Blockburger*, other courts of appeals had indicated the same distaste for the

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larly severe punishment but left unchanged the overlapping coverage of the statutory provisions defining violations.

[26] See *Chiarella* v. *United States* (C.A. 2), 184 F.2d 903, 911; *Harris* v. *United States* (C.A. 8), 248 F.2d 196, 200; see also *United States* v. *Jones* (C.A. 7), 248 F.2d 772 at 773; and *Howard* v. *United States* (C.A.D.C.), 247 F.2d 537, vacated and remanded on other grounds March 10, 1958, —— U.S. ——.

"repetition of the charge with purely formal changes as a device to double the penalty."[27]

The rule of lenity applied by this Court in *Universal C.I.T.*, *Bell* and *Prince* and the doubts expressed by the courts of appeals are founded, we believe, upon a reluctance to impose drastic punitive consequences upon an accused except where they are clearly intended by the legislature. Under the Narcotic Control Act of 1956, by a rigorous application of the *Blockburger* rule it might well be possible to secure an indictment in five counts for the various aspects of the sale of a single heroin capsule by a first offender to an adult purchaser; the penalties permissible might range up to 65 years imprisonment plus fines of $85,000.[28] However, the maximum penalty Congress provided for a *second* offender was 40 years plus $20,000 (26 U.S.C. 7237(b)); Congress evidently deemed that quite sufficient for its purposes.

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[27] Judge Learned Hand in *Amendola* v. *United States* (C.A. 2), 17 F.2d 529, 530; see also *Woods* v. *United States* (C.A. 8), 26 F.2d 63, 65; *Copperthwaite* v. *United States* (C.A. 6), 37 F.2d 846, 847, 848; and *Ballerini* v. *Aderholt* (C.A. 5), 44 F.2d 352, specifically disapproved in *Blockburger* (284 U.S. at 304).

[28] (1) For sale of illegally imported drugs: 5 to 20 years and up to $20,000 (21 U.S.C. 174); (2) for sale not in or from the original stamped package: 2 to 10 years and up to $20,000 (26 U.S.C. 4704(a), 7237(a)); (3) for sale without a proper written order: 5 to 20 years and up to $20,000 (26 U.S.C. 4705(a), 7237(b)); (4) for selling without having paid the registration tax: 2 to 10 years and up to $20,000 (26 U.S.C. 4724, 7237(a)); and (5) for use of a telephone or letter to arrange the sale: 2 to 5 years plus $5,000 (18 U.S.C. 1403).

These hypothetical penalties do not allow for possible permutations under a single statute, such as purchase *and* sale of illegally imported narcotics in violation of 21 U.S.C. 174: two times 5 to 20 years plus $20,000; see, e.g., *Martinez* v. *United States* (C.A. 1), 220 F.2d 740, nor do they include possible conspiracy charges.

Ironically, dealings in the far less addictive drug of marihuana might be still more severely punished because of the separate statutory provisions relating to that drug.

Other adverse consequences of multiple indictment and punishment hardly require more than a mere mention. The presence of a host of crimes charged may sway the jury, just as it may sway the trial judge at the time of sentencing. See, e.g., *Yates* v. *United States*, 355 U.S. 66, 75, 76.[29] The sentence imposed may actually exceed the maximum intended by Congress for the accused as a first, second or subsequent offender, and with the advent of mandatory minimum punishments it certainly will do so in many cases. (Petitioner received a maximum of fifteen years, whereas the Boggs Act prescribed a five-year maximum for first offenders.) Moreover, the number of counts may affect questions of parole or even of sentencing in the event of future convictions. Undoubtedly, too, it may stamp a man in his community as a hardened criminal, rather than someone who has offended only once.

We submit that such grave consequences for the accused ought not to depend upon the prosecutor's ability to turn mere technicality into added criminality, particularly since the purpose of Congress is amply served by a single conviction and sentence.[30] Indeed, viewing the prosecutor's

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[29] See also the remarks of the trial judge at sentencing, quoted in the dissent of Bazelon, J., in *Greene* v. *United States* (C.A.D.C.), 246 F.2d 677 at 682, pet. for cert. pending, No. 77, Misc., October Term, 1957. There the trial judge noted that the indictment contained 15 counts, but the actual sales involved numbered four.

[30] We have focused in this discussion on the first 3 rather than the last 3 counts of petitioner's indictment not because of any operative difference between them but because it is only upon the first 3 counts that petitioner has been given consecutive sentences of imprisonment. If, as we contend, only one of the first 3 counts may stand, then so much of petitioner's sentence as exceeds 5 years on the first 3 counts must be vacated. Inasmuch as petitioner's sentence on the last 3 counts was imposed to run concurrently with the sentence served on the first 3, no problem arises as to these latter counts because the sentence on them will have to run concur-

practice of fragmenting sale offenses and multiplying the seller's punishment, one is reminded of the colloquy in Shaw's "Saint Joan":

> "Courcelles. My lord: we have been at great pains to draw up an indictment of The Maid on sixty-four counts. We are now told that they have been reduced, without consulting us.
>
> "The Inquisitor. Master de Courcelles: I am the culprit. I am overwhelmed with admiration for the zeal displayed in your sixty-four counts; but in accusing a heretic, as in other things, enough is enough. Also you must remember that all the members of the court are not so subtle and profound as you, and that some of your very great learning might appear to them to be very great nonsense. Therefore I have thought it well to have your sixty-four articles cut down to twelve—
>
> "Courcelles [thunderstruck] Twelve!!!
>
> "The Inquisitor. Twelve will, believe me, be quite enough for your purpose."

E. A Construction in Favor of Single Punishment for a Single Sale Is Necessary to Avoid Grave Constitutional Issues

The narcotics laws should be construed to preclude multiple punishment for a single sale in order to avoid serious

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rently with the only valid sentence imposed on the first 3 counts—a maximum 5-year sentence. Indeed, the maximum 5-year sentence result for which we contend appears also to be required by the Boggs Act. Under that Act petitioner is but a first offender whose imprisonment may not exceed 5 years no matter how many counts are joined in his indictment. The operative Boggs Act definition of the second offender is one who "*previously has been convicted*." As petitioner has never been previously convicted of narcotics offenses, the plain language of the Boggs Act precludes the imposition upon him of a sentence of "more than 5 years."

constitutional issues otherwise presented. We have already seen that the legislative history of the statutes in question indicate a unitary intention by Congress to prevent narcotics traffic rather than an intention to punish each aspect of a single sale as a separate offense. The intention which we would ascribe to Congress and the interpretation which we would place on the sections of the narcotics laws here in issue is buttressed not only by the "lenity rule", but also by the rule that statutes should be interpreted to avoid constitutional issues.

We respectfully submit that, for the reasons set forth in Part II of this brief, the sentences imposed upon petitioner violate the double jeopardy provision of the Fifth Amendment. But we suggest to the Court that there is no warrant for reaching that difficult issue. Even a strained construction of a statute has been accepted by the Court, where necessary to avoid a constitutional issue. *United States* v. *CIO*, 335 U.S. 106; *United States* v. *Rumely*, 345 U.S. 41. We ask for no strained construction here; we ask only for the application to the statutes in question of an intent of Congress which has been repeatedly, if indirectly, expressed.

## II

### Petitioner's Triple Punishment for the Simultaneous Violation of Three Sections of the Narcotics Laws Subjected Him to Double Jeopardy in Violation of the Fifth Amendment

In Point I of this brief we have urged that a proper statutory construction precludes the multiple punishment imposed on petitioner for violation of three provisions of the narcotic laws and we have urged that this Court should therefore review and overrule its holding in the *Blockburger* case.[31] If, however, the statutory construction argument be rejected by this Court, there remains for adjudication a fundamental constitutional question which was not argued by the parties in *Blockburger,* whether multiple punishment, such as has been imposed on petitioner, can survive the Fifth Amendment's prohibition against double jeopardy.

In this Point II of this brief we urge a fundamental reevaluation and reformulation of the double jeopardy test this Court has heretofore applied in cases of multiple punishment for the violation, by a single act or transaction, of related statutory prohibitions and we urge that, applying the proposed standard, petitioner's multiple punishment subjected him to forbidden double jeopardy. However, before we examine the question whether the offenses of which petitioner was convicted are the "same offence" within the meaning of the constitutional prohibition on double jeopardy, we examine a preliminary question which

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[31] *Blockburger* did not involve a conviction for concealment and sale under the Import and Export Act, but it has been uniformly construed, as it was by the court below, to apply to simultaneous convictions under that statute as well as under the Harrison Act.

has caused considerable concern in the implementation of the double jeopardy provision—whether the provision precludes double punishment imposed not in successive trials, but as a result of multiple counts joined in a single trial.

### A. The Double Jeopardy Provision Precludes Double Punishment Imposed at a Single Trial

Petitioner was consecutively sentenced on three counts on which he was convicted at a single trial. Because doubts have been expressed concerning the applicability of the double jeopardy clause of the Constitution under these circumstances,[32] we seek first to demonstrate the clear applicability of this prohibition where double punishment is imposed as the result of a single trial.

The original version of the double jeopardy clause as it was introduced by Madison in the House of Representatives in 1789 prescribed that "*No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence . . .*" (1 Annals of Congress 434). Contemporaneous legislative history gives further indication of the extent to which multiple punishment rather than successive trials was the fundamental concern of the framers.[33] In the course of the House debate on the Madison proposals Representative Benson stated that "The humane intention of the clause was to prevent

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[32] See, e.g., *Calveresi* v. *United States*, 216 F.2d 891, 902; *Michener* v. *United States*, 157 F.2d 616, 620; *Hensley* v. *United States*, 156 F.2d 675; *United States* v. *Noble*, 155 F.2d 315, 318, n. 6; *White* v. *Pescor*, 155 F.2d 902; *People* v. *Savarese*, 1 Misc. 2d 305, 114 N.Y.S. 2d 816, 821; 65 Yale L. J. 339, n. 4.

[33] The "no double punishment" focus of the double jeopardy concept at common law is highlighted by the early declaration in The Massachusetts Body of Liberties of 1641 that "No man shall be twise sentenced by the Civill Justice for one and the same Crime, offence, or Trespasse." See also authorities cited in Comment, 65 Yale L. J. 339, 341, n. 13.

*more than one punishment;* for which reason he would move to amend it by striking out the words 'one trial'" (1 Annals of Congress 753). After objection by other members that "striking out the words would seem as if they meant to change the law by implication, and expose a man to the danger of more than one trial" and "instead of securing the liberty of the subject, it would be abridging the privileges of those who were prosecuted", Representative Benson's motion was defeated.[34] The "more than one pun-

[34] The full House discussion as it appears in 1 Annals of Congress 753 was as follows:

"*Mr. Benson* thought the Committee could not agree to the amendment in the manner it stood, because its meaning appeared rather doubtful. It says that no person shall be tried more than once for the same offence. This is contrary to the right heretofore established; he presumed it was intended to express what was secured by our former Constitution, that no man's life should be more than once put in jeopardy for the same offence; yet it was well known, that they were entitled to more than one trial. The humane intention of the clause was to prevent more than one punishment; for which reason he would move to amend it by striking out the words 'one trial or'.

"*Mr. Sherman* approved of the motion. He said, that as the clause now stood, a person found guilty could not arrest the judgment, and obtain a second trial in his own favor. He thought that the courts of justice would never think of trying and punishing twice for the same offence. If the person was acquitted on the first trial, he ought not to be tried a second time; but if he was convicted on the first, and any thing should appear to set the judgment aside, he was entitled to a second, which was certainly favorable to him. Now the clause as it stands would deprive him of that advantage.

"*Mr. Livermore* thought the clause very essential; it was declaratory of the law as it now stood; striking out the words would seem as if they meant to change the law by implication, and expose a man to the danger of more than one trial. Many persons may be brought to trial for crimes they are guilty of, but for want of evidence may be acquitted; in such cases, it is the universal practice in Great Britain, and in this country, that persons shall not be brought to a second trial for the same offence; therefore the clause is proper as it stands.

"*Mr. Sedgwick* thought, instead of securing the liberty of the subject, it would be abridging the privileges of those who were prosecuted.

ishment or one trial" formulation was replaced in the Senate by the "twice put in jeopardy" text finally adopted,[35] but there is no evidence that this alteration in any way reflected disagreement with the understanding reflected in the House debate that the focal protection of the provision was against double punishment.[36]

The first significant test of the double jeopardy provision's protection against double punishment resulting from a single trial came in *Ex Parte Lange*, 18 Wall. (85 U. S.) 163, decided by this Court in 1874. That case involved a trial judge's attempt to resentence a man and impose upon him a sentence more severe than the one originally imposed. This Court found that the double jeopardy provision precluded that attempt at double punishment, in the following relevant terms (at p. 173):

> "... we shall see ample reason for holding that the principle intended to be asserted by the constitutional provision must be applied to all cases where a second

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"The question on Mr. Benson's motion being put, was lost by a considerable majority."

[35] That there was as much concern with the dual punishment aspects as was actually shown at the time of the adoption of the double jeopardy provision is both surprising and significant in view of the fact that double punishment was not then possible in a single trial. At common law an indictment could generally charge only one felony and only one sentence could be imposed upon it. See 1 Chitty, *Criminal Law*, 170-172 (First Edition, 1819); 1 Stephen, *A History of the Criminal Law of England*, 508; Saunders, *Precedents of Indictments*, 20-22 (Second Edition, 1889). Thus at common law the "twice put in jeopardy" prohibition *necessarily* precluded multiple punishment.

[36] Some of the constitutional history relied upon here, including the statements of Mr. Benson on the House floor, is cited in the dissenting opinion by Mr. Justice Frankfurter in *Green v. United States*, 355 U.S. 184. We submit that, whatever the effect of this contemporaneous constitutional history on the issue of retrial upon which this Court was divided in the *Green* case, the material unequivocally supports the contention in the instant case that double punishment is within the purview of the double jeopardy provision.

punishment is attempted to be inflicted for the same offense by a judicial sentence.

"For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and on a second conviction a second punishment inflicted?

"The argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it."

Subsequently, in *In re Snow*, 120 U.S. 274, 286, the doctrine of *Ex Parte Lange* was applied in a case where multiple sentences had been imposed in a single judgment. Snow had been separately tried on three counts charged in three different indictments for unlawful cohabitation and had been sentenced to consecutive terms in a single judgment upon the three verdicts. Snow's argument to this Court that he had been subjected to double punishment was upheld, the Court citing *Ex Parte Lange* as controlling. And in 1931 the holding of *Lange* that double punishment is

precluded by the double jeopardy guarantee was again reviewed and emphatically reaffirmed by this Court in *United States* v. *Benz*, 282 U.S. 304 at 307-309.

In view of this constitutional and judicial history, it is only a single sentence in the opinion of Mr. Justice Roberts in *Holiday* v. *Johnston*, 313 U.S. 342, 349, that raises any question as to the applicability of the double jeopardy provision to cases of double punishment.[37] In *Holiday* the petitioner had asserted in a habeas corpus proceeding that he had been improperly sentenced, in violation of the double jeopardy prohibition, both for a robbery and for jeopardizing lives in the course of that robbery. The Government, in this Court, conceded the impropriety of Holiday's double sentence as a matter of statutory interpretation, but asserted that the issue was prematurely raised through habeas corpus because the second sentence had not yet begun to run; by implication the Government conceded the pertinence of the double jeopardy argument to a case such as that now before the Court, for it sought to evade that argument only on the ground that Congress could separately punish a single criminal act which threatened both life and property.

This Court reversed the lower court decision against Holiday because of procedural irregularities, but, as concerns Holiday's double jeopardy contention, Mr. Justice Roberts wrote the sentence (at p. 349) which has created speculation in some quarters whether double jeopardy prohibits double punishment: "The erroneous imposition of two sentences for a single offense of which the accused has

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[37] The dictum in *United States* v. *Ball*, 163 U.S. 662, 669, and in the dissenting opinion by Mr. Justice Holmes in *Kepner* v. *United States*, 195 U.S. 100, 134, might be cited to indicate that the double jeopardy provision does not preclude double punishment, but in both cases the discussion did not actually relate to the double punishment problem.

been convicted, or as to which he has pleaded guilty, does not constitute double jeopardy." Curiously, this dictum was immediately followed by a contradictory concession: "And if, as the petitioner contends, the first sentence of ten years is valid and the second void, he is no better off. Conceding, without deciding, that he is right in saying the first sentence is the only valid one, he has not served that sentence and is not entitled now to be discharged from custody . . ."

The highly equivocal dictum of Mr. Justice Roberts in *Holiday* cannot, in the light of the constitutional and judicial history we have reviewed, be taken as a *sub silentio* overruling of *Ex Parte Lange*, *In re Snow* and *United States* v. *Benz*.[38] Indeed such a possibility is completely precluded by decisions of this Court subsequent to *Holiday*. Less than two years after that decision, this Court based its decision in *In re Bradley*, 318 U.S. 50, on the "no double punishment" holding of *Ex Parte Lange*, despite a dissent calling for reexamination and rejection of a portion of that holding.[39] And more recently, in *Francis* v. *Resweber*, 329 U.S. 459, 462, this Court reaffirmed the *Ex*

[38] The Government itself apparently puts no reliance on the dictum in *Holiday*. In one-trial-multiple-count cases where double jeopardy arguments have been presented, it has not sought to rely on the *Holiday* dictum (see, *e.g.*, Brief for the United States in *United States* v. *Michener*, No. 793, October Term, 1946) and it has recently stated here that "for the purposes of double jeopardy this Court has not differentiated between multiple sentences and retrial after a prior acquittal or conviction on one offense." Brief for the United States, *Ladner* v. *United States*, No. 41, October Term, 1957, at p. 20.

[39] Lower courts have applied, and legal commentators have generally conceded the applicability of, the double jeopardy guarantee to single-trial-multiple-count cases. See, e.g., *French* v. *United States*, 42 F.2d 354; *Freeman* v. *United States*, 146 F.2d 978; Note, *Double Jeopardy and the Multiple-Count Indictment*, 57 Yale L. J. 132, 133; Kirchheimer, *The Act, the Offense and Double Jeopardy*, 58 Yale L. J. 513, 526, 544.

*Parte Lange* interdiction of double punishment in the strongest possible terms:

> "Our minds rebel against permitting the same sovereignty to punish an accused twice for the same offense. *Ex Parte Lange*, 18 Wall. 163, 168, 175."

In sum, a review of this Court's decisions upholding the double punishment prohibition of the double jeopardy clause,[40] can leave no doubt that today, as much as in 1789, it is the "humane intention of the clause . . . to prevent more than one punishment." If petitioner was punished more than once for a single transgression, then the double jeopardy protection applies though the punishments were imposed as a result of a single trial.

We turn now to consider whether, within the meaning of the double jeopardy prohibition, petitioner has been twice punished for the same offense.

B. In Determining Whether Multiple Punishment for a Single Act or Transaction Violates the Double Jeopardy Clause, the "Different Evidence" Formula Heretofore Applied by This Court Should Be Supplemented by a "Distinct Evil" or "Distinct Interest" Test of Constitutionality

Where more than one statutory provision is violated by a single act or transaction, perplexing double jeopardy prob-

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[40] In cases where double jeopardy contentions have been raised against multiple count convictions and sentences, this Court has examined those double jeopardy contentions on the merits, apparently accepting the applicability of the constitutional provision. See, e.g., *Carter* v. *McClaughry*, 183 U.S. 365; *Morgan* v. *Devine*, 237 U.S. 632; *Albrecht* v. *United States*, 273 U.S. 1; *American Tobacco Co.* v. *United States*, 328 U.S. 781; *Pereira* v. *United States*, 347 U.S. 1.

lems arise.[41] Thus, Congress may place various affirmative obligations upon a single sale of a narcotic, such as the obligation to obtain a written order on a Treasury form as well as the obligation to obtain a tax stamp. But the question still remains whether, consistent with the double jeopardy provision, a person may be thrice punished if he sells a narcotic and sells it without written order and without the tax stamp.

Heretofore this Court has found the answer to such problems by application of a "same essential evidence" or "essential element" test of constitutionality. Under that test multiple punishment and multiple trial is permitted so long as each offense charged has a distinct "element", or some different "essential evidence" is required for the proof of each offense charged. We urge the Court to undertake a re-examination of this formula and to adopt a formulation more clearly attuned to the purpose of the constitutional guarantee.

The first time this Court was confronted with the issue of double jeopardy in a "dual violation" case—one where a single act is punishable under separate criminal provisions—was apparently in *Ex Parte Nielsen*, 131 U.S. 176, decided in 1889. There the Court found unlawful double jeopardy in the adultery prosecution of a defendant who had previously been convicted of the crime of unlawful cohabitation during the same period with the same woman. This Court applied no mechanical rule to determine whether the offenses were separate; rather the Court applied the theory that, since Congress pursued the same basic purpose in enacting the cohabitation and adultery statutes,

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[41] Some states have simply applied a "one transaction test" to preclude double punishment where a single act or transaction gives rise to violation of more than one law. See Note, 7 Brooklyn L. Rev. 79, 83-85.

the single illicit relationship could not constitutionally be treated as a violation of both penal provisions.

This teleological approach was, however, short-lived. The next case to present the problem was *Carter* v. *McClaughry*, 183 U.S. 365, decided in 1902. It was resolved by the adoption of the common law "different evidence" formula.[42] See *Rex* v. *Vandercomb and Abbott*, 2 Leach 708, 168 English Rep. 445. Under this rule if each of the laws transgressed by a single act or transaction has a different element, or different evidence is essential to the proof of each offense, then multiple punishment of the offender does not violate the double jeopardy clause. The different evidence test was adopted in *Carter* v. *McClaughry* without any analysis of the extent to which it may render impotent the constitutional prohibition. We believe that where distinct crimes are carved out of essentially one anti-social act or numerous affirmative burdens are imposed upon a single prohibited transaction, the "different element" test is woefully inadequate to determine whether separate trials or separate punishments are constitutionally permissible. Unfortunately, however, the uncritical adoption of the mechanical different evidence test has been adhered to since *Carter* v. *McClaughry* in a series of decisions of this Court. *Burton* v. *United States*, 202 U.S. 344; *Gavieres* v. *United States*, 220 U.S. 338; *Morgan* v. *Devine*, 237 U.S. 632; *Albrecht* v. *United States*, 273 U.S. 1; *Blockburger* v. *United States*, 284 U.S. 299; *American Tobacco Co.* v. *United States*, 328 U.S. 781; *Pinkerton* v. *United States*,

[42] The insufficiency of the different evidence test was apparently recognized by the Government in its brief in this Court in *Carter* v. *McClaughry*. In addition to suggesting the mechanical different evidence test lifted from *Morey* v. *Commonwealth*, 108 Mass. 433, the Solicitor General repeatedly urged in this Court that "under each of the said charges the *gist* of each offense is separate and distinct" (emphasis supplied). Brief for Appellee, No. 251, October Term, 1901, pp. 97, *et seq.*

328 U.S. 640; *United States* v. *Michener*, 331 U.S. 789; *United States* v. *Bayer*, 331 U.S. 532; *Pereira* v. *United States*, 347 U.S. 1. See Appendix A, *infra*, for a discussion of these cases.

Although the different evidence test provided a convenient "rule of thumb" for differentiation of common law offenses, it is wholly inadequate in a day of statutory multiplication, proliferation and splintering of a single criminal transgression, which may render a person liable for violation of numerous statutes by virtue of a single act or transaction.[43] Where Congress has set out either to render one act or transaction criminal under various related statutes or to impose numerous affirmative statutory obligations upon a person in connection with his commission of a single, forbidden act, mechanical application of the different evidence test can result in the utter defeat of the protective purpose of the double jeopardy clause.

Thus, it soon became apparent that mechanical application of the common law different evidence test to the congressionally-proliferated federal offenses deprives the double jeopardy guarantee of any real vitality in this area. Federal courts, both before and after *Blockburger*, expressed their dissatisfaction with the common law standard, especially in the area of the alcohol and narcotics laws where single transactions have been subjected to an unusual

[43] In an effort to mitigate the severe effects of the different evidence test, courts have carved out exceptions and limitations to render it less harsh. Among these exceptions is the rule that necessarily included offenses are merged, the rule that specific legislative enactments on a subject are merged into more general legislative enactments on the same subject, and the doctrine of *res adjudicata* which may preclude retrial on related offenses after an acquittal. For a discussion of these mitigating rules see Kircheimer, *The Act, the Offense and Double Jeopardy*, 58 Yale L. J. 513, 529-534; Note, 7 Brooklyn L. Rev. 79; A.L.I. Model Penal Code: Tentative Draft on Double Jeopardy (Draft No. 5, 1956), Section 1.08(1)(a)(b)(c)(d)(e), and comments thereon in A.L.I., 1956 Debates, pp. 136, *et seq.*

degree of congressional proliferation.[44] After the *Blockburger* case was decided, the different evidence test evoked increasing criticism in the legal journals.[45] In 1942 Mr. Justice Rutledge, then a judge in the District of Columbia Circuit, expressed the growing dissatisfaction with the test as a sufficient implementation of the double jeopardy prohibition in a concurring opinion in *District of Columbia* v. *Buckley*, 128 F. 2d 17, 21.[46] Mr. Justice Rutledge gave clear and forceful expression to the view that the common law test does not meet modern exigencies:

> "I concur in the result, and in the opinion except as it may imply that no more is necessary in any case, to determine double jeopardy, than to apply the 'same or different evidence' test.
>
> "That test is useful to spell out the elements of the crimes charged, and therefore to disclose what, if any, difference exists between them. If there is none that ends the matter. But if difference is disclosed there is in my view always another step which must be and is taken either intuitively or with deliberation. That is to weigh the difference to determine whether it is substantial or too minor to be material for purposes of double jeopardy. The court must evaluate as well as spell out the difference, and determine whether the element it affects is sufficiently important in relation to other elements involved in both crimes to justify refusal to apply the constitutional protection.

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[44] See, *e.g.*, cases cited Note, 45 Harv. L. Rev. 535, 537-540; 58 Yale L. J. 513, n. 2; see also n. 27, p. 49, *supra*.

[45] See, e.g., Note, *Double Jeopardy and the Multiple Count Indictment*, 57 Yale L. J. 132; Comment, 40 Yale L. J. 462; Note, *Double Jeopardy and the Concept of Identity of Offenses*, 7 Brooklyn L. Rev. 79.

[46] See also dissenting opinion of Mr. Justice Rutledge in *Pinkerton* v. *United States*, 328 U.S. 640, 648. Cf. *People* v. *Savarese*, 1 Misc. 2d 305, 114 N.Y.S. 2d 816, 833.

"Usually the difference will be substantial and this will be immediately apparent when the test is applied. In other words, most crimes have substantial differences. But in some instances legislative refinement has defined generically identical offenses with narrow differences in intent or in the means or methods of perpetration, e.g., assault with various specific intents and with variously specified weapons. Some of these differences are substantial, others too slender for, in effect, nullifying the constitutional protection against double jeopardy. When they are so or the question is doubtful, the second step should be taken consciously and deliberately, not ignored or taken automatically as is done when the process stops with applying the 'same or different evidence' test. That can only tell what the difference is, not whether it is important enough to prevent operation of the constitutional guaranty."

Mr. Justice Rutledge's call for re-examination of the sufficiency of the different evidence test did not go unanswered. In 1949 there appeared an analysis by Otto Kirchheimer in the Yale Law Journal (58 Yale L. J. 513) examining the different evidence test at length. The author suggested first (at p. 520) that in cases "where the legislator has attempted to carve out a variety of offenses from one and the same transaction . . ." then "whenever one criminal act seems to include a later stage of execution of a particular criminal intent, the offense describing the earlier stage should merge into the offense describing the more complete state of the identical act." This doctrine of merging into one offense the elements of a transaction such, for instance, as the possession and sale of the same object, has recently been adopted in the American Law Institute proposed draft on double jeopardy (Draft No.

5, 1956). In Section 1.08(1)(b) the drafters propose the merger of offenses involving preparation to commit the offense into the consummated offense.[46a] Commenting upon this section, its proponent, Professor Herbert Wechsler, has stated (A.L.I., 1956 Debates, pp. 137-138):

> "There we have in mind so much legislation which will strike at a particular area of criminality by singling out Step A, Step B and Step C in the normal pattern that is involved in doing the thing that the statute is striking against.
>
> "Take the statutes dealing with illegal distillation, the revenue laws, where there are 4 or 5 or 6 separate prohibitions, but what is involved is that the draftsman has drawn out each of the discrete things that is normally done in this activity."

In his critique Kirchheimer goes on to propound (at pp. 522-524) a more comprehensive test to supplement the different evidence rule in cases where more than one offense arises out of a single act or transaction: *whether the different enactments protect "different interests or whether a*

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[46a] While the cited A.L.I. text appears to run counter only to the *Albrecht* decision, *supra*, and to leave the *Blockburger* rule intact, examination of further A.L.I. proposals indicates disapproval of the *Blockburger* result as well. Thus, in Section 1.08(2) of the Tentative Draft No. 5 on Double Jeopardy, it is proposed that all offenses "based on the same conduct" or "on a series of acts or omissions motivated by a purpose to accomplish a single criminal objective, and necessary or incidental to the accomplishment of that objective" be joined in a single prosecution. To this single trial proposal must be added the recommendation in Section 7.06 of the A.L.I. Model Penal Code Tentative Draft No. 2 (1954) that, in imposing punishment on convictions for violation of a number of statutes all sentences are to run concurrently and "be deemed satisfied by service of the longest sentence imposed." *Cf.*, Section 7.03(4)(a) of the same Tentative Draft. The net result of these recommendations would be to preclude the multiple punishment sanctioned by *Blockburger* and other decisions of this Court applying the same evidence test in dual violation cases.

*host of apparently independent offenses has been created in an attempt to catch up with new modes of undermining the same interest."* It is suggested that where there is true "norm competition," that is, where "interests are protected by the law for entirely distinguishable reasons" (for instance, such as the laws against incest and adultery which may be violated by a single act) the state is free to punish the offender under both provisions. Where, however, there are no "separable social interests sought to be protected by the different provisions of the law", Kirchheimer suggests that a single act or transaction is punishable as only one offense.

This test has been followed in an important federal jurisdiction. In *United States* v. *Beene*, 4 U.S.C.M.A. 177, 15 CMR 177, the Court of Military Appeals carefully analyzed and rejected the different evidence test as a sufficient guide for resolution of multiple violation cases. The Court stated (pp. 178-181) that the different evidence test cannot "serve as a universal solvent." It rejected that test's "*in vacuo* approach to the problem of multiplicity" and it specifically adopted for the military the "competing norms" test, whereby multiple punishment is permitted only when the statutes offended by a single act or transaction reflect legislative protection of distinct and separable social interests.[47]

Finally, the Government itself has rejected the mechanical different evidence test. In *United States* v. *Michener*, No. 793, October Term, 1946, the Government petitioned for

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[47] It may be worthy of note that in *United States* v. *Beene* the wheel has come full circle, for the military, the first federal jurisdiction wherein the different evidence test was adopted (see *Carter* v. *McClaughry, supra*), has thus become the first federal jurisdiction to reject it. See also *United States* v. *Johnson*, 5 U.S.C.M.A. 297, 17 C.M.R. 297; *United States* v. *Redenius*, 4 U.S.C.M.A. 161, 15 C.M.R. 161.

certiorari in a case where the lower court had precluded punishment for both possession of and manufacture of the same counterfeiting plate. In its brief in this Court the Government rejected any mechanical test of double jeopardy:

> "We do not, of course, contend that just because offenses substantially identical are couched in different language or there are other insignificant differences betwen them, the double-jeopardy barrier is hurdled. As Mr. Justice Rutledge pointed out in the *Buckley* case (128 F. 2d 21), 'in some instances legislative refinement has defined generically identical offenses with narrow differences in intent or in the means or methods of perpetration, e.g., assault with various specific intents and with variously specified weapons. Some of these differences are substantial, others too slender for, in effect, nullifying the constitutional protection against double jeopardy.' Cf. *Crain* v. *United States*, 162 U.S. 625, 636. Even if there be room for a difference of opinion as to individual cases, the decisions of this Court, as a whole, disclose that the criterion which has guided it in the application of the double-jeopardy principle, is whether the difference between the offenses is merely formal or substantial" (at pp. 29-30).

The Government in its *Michener* brief undertook a reanalysis of the leading "different evidence" opinions of this Court, and concluded that in those cases "separate punishment was permissible because each offense was aimed at a substantially distinct evil":[18]

> "This Court, in determining whether there is a difference between offenses in the application of the

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[18] Cf. Mommsen, *Roemisches Strafrecht*, 889, suggesting a similar rationalization of the Roman law.

double-jeopardy clause, has generally applied what has become known as the 'same or different evidence' test, a test which if it discloses a difference will, as Mr. Justice Rutledge pointed out in his concurring opinion in *District of Columbia* v. *Buckley*, 128 F.2d 17, 21, usually show that, as here, the difference is substantial. *But, essentially, it seems to us, the decisions in this Court which have held, in particular cases, that double-jeopardy does not exist, have come down to the proposition, whether it be expressly articulated or merely arrived at intuitively, that a separate punishment was permissible because each offense was aimed at a substantially distinct evil.* And this principle has been applied no matter how closely the offenses are related, whether they are occasioned by one act or grow out of one transaction or course of conduct, whether they are motivated by one intent, *or whether the same evidence in fact establishes each*" (at p. 21) (emphasis supplied).

In lieu of the different evidence test which has been the purported basis of this Court's double jeopardy decisions the Government suggested (p. 12) the constitutional inquiry *"whether the difference between the offenses is merely formal or whether each is aimed at a substantially distinct evil"*.

In short, the Government has accepted Mr. Justice Rutledge's plea for a more refined formulation to test the scope of the double jeopardy provision in dual violation cases than the test heretofore applied and has postulated in this Court a "substantially distinct evil" test similar to that propounded by Kirchheimer, whether there are "separable social interests sought to be protected."[19]

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[19] We are in agreement with the Government that most of the previous cases wherein this Court has rejected the double jeopardy

* * * * *

We respectfully submit that this Court should supplement the different evidence test with an additional test of "distinct interest" or "distinct evil." The different evidence test is the product of archaic common law rules of criminal pleading in effect at the time of its adoption in 1796 in *Rex* v. *Vandercomb and Abbott,* 2 Leach 708, 168 English Rep. 445. The rule was evoked to soften the effect of the rigid common law requirement of pleading particular evidence and particular legal theory, and precluding alternative or multiple counts. See Comment, 65 Yale L.J. 339, 341-344, and authorities cited. Because these strict criminal pleading requirements tended to result in fatal variance at trial between pleading and proof, the different evidence test was devised to afford the prosecution a second chance at a conviction. But in 1902 this Court adopted the *Morey* v. *Commonwealth* (108 Mass. 433) test of double jeopardy derived from *Rex* v. *Vandercomb and Abbott* apparently without considering that the test was originally designed to alleviate pleading burdens placed upon the prosecution by common law rules long since abandoned.[50]

If two penal provisions violated by the same act seek to protect the same interest and prevent the same evil, only

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contentions raised in multiple violation cases by the use of its different evidence guide, might well have been decided the same way had the additional test of distinct evil been applied. We have set forth in *Appendix A* to this brief a summary of the pertinent decisions of this Court together with our comments on the probable impact of a "substantially distinct evil test" upon each case.

[50] Attempts to reconcile divergent decisions applying the different evidence rule have been unsuccessful. See, *e.g.*, Note, 24 Minn. L. R. 522, 546-558; A.L.I., *Administration of Criminal Law: Double Jeopardy* (1935), pp. 26-61. A fair conclusion from these attempts at reconciliation is that, in straining to avoid the limitations of this mechanical test of constitutionality, the courts have so varied and misapplied it as to render it somewhat meaningless.

one punishment should be permitted. Where the same social interests and the same public evils give rise to separate legislative enactments, the simultaneous violation of both statutes should be deemed but one offense within the meaning of the Fifth Amendment. Thus, for instance, the concealment and sale of a forbidden object like a narcotic can legitimately be precluded by Congress and Congress may also affirmatively require both a written order on Treasury form and a Treasury tax stamp for the sale of the narcotic. But the interest in prevention of narcotic trafficking is fully served by giving validity to the various enactments, with the limitation only that punishment cannot be had under more than one. For once an individual has been apprehended and subjected to trial, there is no purpose served by punishing him thrice for his concealment and sale, for his failure to obtain a tax stamp and for his failure to obtain a written order. The interest in effective apprehension and prevention has been fully served at this point by single punishment and the policy of the double jeopardy clause must at this point step in to preclude triple punishment, where by one act or transaction the offender has caused only one cognate injury to the state.

We urge this Court to reconsider the sufficiency of the different evidence test in measuring multiple punishment against constitutional standards.[51] Although that test has

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[51] No occasion arises at this time for the Court to consider the possible applicability of a distinct evil or distinct interest test to the "unit of prosecution" cases wherein multiple punishment is imposed for the multiple violations of the same statutory prohibition by one act or transaction. It may be, however, that the same distinct interest test might some day be applied in the unit of prosecution cases. Many of the unit of prosecution cases (see, e.g., *Hoag* v. *New Jersey*, *Ladner* v. *United States*, No. 40 and 41, October Term, 1957; *Bell* v. *United States*, 349 U.S. 81) involve some form of personal assault. In such cases the distinct evil cri-

been applied by this Court in a significant number of decisions since *Carter* v. *McClaughry* (see Appendix A, *infra*), it is clear that the test was lifted from its archaic common law antecedents without adequate consideration of the question whether it gives sufficient play to the constitutional interests preserved by the double jeopardy prohibition. The *Carter* decision itself ignored an earlier pronouncement of this Court in *Ex Parte Nielsen, supra.* The different evidence test has met with continued judicial and scholarly criticism. It has been rejected by the Court of Military Appeals. And finally, the Government itself has conceded in this Court that the test is insufficient and must be supplemented by examination of the question "whether the difference between the offenses is merely formal or whether each is aimed at a substantially distinct evil."

We urge this Court to disavow mechanical application of the different evidence test and, in cases where that test is met in the sense that the offenses have distinct elements, to inquire further whether the statutes are aimed at "substantially distinct evils" or whether they seek to protect "separable social interests." We proceed now to a demonstration that since no distinct evil or separable social interest inheres in the statutes for whose violation peti-

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terion may have been met, since the legislature may perceive a distinct evil in the unlawful assault of any individual. In other words, for crimes involving assault on the person an individual human being is a rational unit in the legislative definition of the "unit of prosecution." There may, however, be cases where there has been an irrational splintering of an offense into units too small to imbue each with a distinct interest or evil. An example that comes to mind is the tendency to treat as a separate violation of law each calendar day of refusal to meet some governmental registration requirement. See, *e.g.*, Internal Security Act, 50 U.S.C. 794. In such cases it may validly be asked whether the legislature has reasonably perceived a distinct evil coexistent with the constituent unit. If not, it would seem that the double jeopardy provision is transgressed by multiple punishment. *Cf.*, Comment, 65 Yale L. J. 339, 365-368.

tioner has been separately convicted and punished, his multiple punishment contravenes the constitutional prohibition on double jeopardy.

C. Petitioner's Triple Punishment for Violation of Three Narcotics Statutes, All Designed to Serve the Identical Social Interest and to Prevent the Identical Public Evil, Subjected Him to Double Jeopardy

We have set forth in Point I of this brief the evidence that there was but a single evil which Congress sought to prevent, and but one social interest it sought to preserve, in the enactment of the three statutes upon which petitioner stands convicted and consecutively sentenced. The legislative history both before and after *Blockburger* makes clear that the single purpose of the statutes here involved is to prevent the non-medicinal sale and use of narcotics. If this Court finds, as we request, that this one purpose underlies the three statutes, then the double jeopardy provision precludes petitioner's triple punishment for simultaneous violation of the three provisions by a single sale.[52]

Certainly Congress has the power, through control of imports and commerce and by use of its taxing authority, to suppress non-medicinal use of narcotics. See, e.g., *Alston* v. *United States*, *supra*. Certainly too, it can render illegal each step in the transaction including the purchase, possession, concealment, transportation and sale. See, e.g., *Nigro*

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[52] Because petitioner has been thrice tried and punished for the same offense, it becomes unnecessary in this case to determine at what point the double jeopardy prohibition precludes further proceedings against a defendant on multiple counts at a single trial. It may be that the Government is required by the prohibition to elect upon which count it will go to the jury and possibly even to elect upon which count it will proceed at the trial. Cf., *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 225; *Yates* v. *United States*, 355 U.S. 66.

v. *United States, supra.* What does not follow, however, is that a defendant may thrice be punished when by a single act he has transgressed the tax stamp, the written order and the concealment and sale provisions of the narcotics laws. If the evil at which these provisions are aimed be taken, as it must, as the sale of narcotics for non-medicinal purposes, then the double jeopardy provision steps in to prohibit treating a single sale as multiple criminality merely because the offender has simultaneously violated the tax stamp and written order provisions. Otherwise, the double jeopardy provision has been stripped of the fundamental meaning the founders sought thereby to promote—protection from multiple punishment for a single injury to the state.

Manifold evils are fostered by multiple punishment for simultaneous violation of indistinguishable narcotics provisions based on but one cognate social injury. Multiple punishment for a single injury arising out of a single act, based on the overlapping and proliferated Federal narcotics scheme, affords opportunity for oppressive and arbitrary governmental action. First, it permits significant disparity in punishment, based on no more than the diligence of a prosecutor in multiplying the counts in an indictment by charging a violation of every one of the related statutes.[53] Secondly, in view of the high upper limits of punishment

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[53] Unlike the practice elsewhere, we understand that Federal prosecutors in California do not employ the multiple count technique in narcotics cases. The arbitrary disparity in sentencing which is thus created in different Federal jurisdictions aggravates the disparity created when, by the mere addition of a few lines on an indictment, punishment can be made to fit the criminal instead of the crime. Speaking of this practice, Mr. Justice Rutledge stated in his dissent in *Pinkerton* v. *United States*, 328 U.S. 640, 653: "I do not think the prosecutor's technical, and it would seem insubstantial, variations in the details of the indictment should be permitted to achieve so much."

prescribed by Congress for narcotics offenses, it may easily result in excessive punishment. Thirdly, it permits arbitrary treatment of the citizen by his Government because it subjects a defendant to the untrammeled and unbridled predilections of a prosecutor.

To treat as if he were a triple offender one who has, by a single act, violated separate statutes designed to secure the state from a single injury and to preserve a single interest, is in itself arbitrariness. No man should be twice tried or twice punished for one transgression, yet petitioner has been three times punished merely because a prosecutor saw fit to multiply the counts against him for a single sale by charging him with violation of practically indistinguishable Federal criminal enactments. When criminality depends on mere technicality, as here, then arbitrariness has replaced reason and policy in the implementation of criminal law.[54]

And finally, it cannot be put aside that even the technical "different evidence" distinctions between the tax stamp, written order and concealment and sale violations of which petitioner was convicted, are subject to judicially and congressionally created "presumptions of fact." Those presumptions make conviction under all three statutes virtually automatic upon proof of the sale itself. There is thus added to the arbitrariness of the procedings the consideration that the "different evidence" can hardly be deemed different. A defendant against whom nothing but a single sale is proved, may be simultaneously convicted and punished, or subjected to piecemeal prosecution, for violation of three

[54] Furthermore, it cannot be lightly assumed that all who are charged with narcotics act violations are guilty thereof. The multiplication of counts for narcotics is calculated more easily to secure conviction because of the inevitable effect upon judge and jury when a defendant is charged in so many counts with apparently distinct violations of the law. Cf., *Yates* v. *United States*, 355 U.S. 66.

practically indistinguishable narcotics laws, designed to protect against but a single unlawful consequence.

Meaningful implementation of the double jeopardy provision of the Constitution requires the employment of a "distinct interest" or a "distinct evil test" in preference to mechanical application of the same evidence rule heretofore used as a guide to constitutionality. If the more sensitive guide be adopted, we submit that only a single social interest and a single public evil underlie the narcotics provisions for whose violation petitioner has been separately convicted and punished. We urge this Court to uphold the fundamental purpose of the founders in the application of the Fifth Amendment's double jeopardy prohibition by permitting only one punishment for a transgression resulting in but a single injury to society.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be reversed and remanded with instructions to grant petitioner's motion and to vacate the cumulative sentences imposed upon him.

Respectfully submitted,

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## Appendix "A"

### Decisions of This Court Concerning Multiple Punishment for Violation, by a Single Act or Transaction, of Separate Statutory Prohibitions

For the convenience of the Court there are summarized below in historical sequence the decisions wherein this Court has ruled on multiple punishment for the violation by a single act or transaction of separate statutory provisions. The so-called "unit of prosecution" cases involving multiple violations by a single act or transaction of the *same* statutory provision are not included.

*Ex Parte Nielsen*, 131 U.S. 176 (1889)

This Court first considered the "dual violation" issue presented by multiple punishment for violation by one act or transaction of separate criminal enactments in *Ex Parte Nielsen*. The Court held that "conviction of unlawful co-habitation is a bar to . . . subsequent prosecution for the crime of adultery." There was no attempt made to apply a "same or different evidence" test.

The decision is consistent with the suggested "distinct evil" test, for the statutes were aimed at the same wrong—indeed this Court so held, stating that "though marriage need not be strictly proved on a charge of unlawful co-habitation, yet it is well known that the statute of 1882 was aimed against polygamy."

*Carter* v. *McClaughry*, 183 U.S. 365 (1902)

The dual violation problem next arose in *Carter* v. *McClaughry*, where this Court first applied the "same or different evidence" standard. The Court there held against the double jeopardy contention because each of the crimes for which the defendant had been convicted and sentenced (conspiracy to defraud, causing false and fraudulent claims to be made and conduct unbecoming an officer by virtue of the first two offenses) "requires proof of an additional fact which the other does not."

The result in *Carter* v. *McClaughry* appears consistent with the "distinct evil" test. The traditional distinction between conspiracy and the consummated substantive offense has long been recognized as resting on the distinct social interest in prevention of group wrong-doing. And, as concerns the offense of "conduct unbecoming an officer", this reflects the unique interest of the military in an exceptional standard of conduct among its officers.

*Burton* v. *United States*, 202 U.S. 344 (1906)

In *Burton* this Court, in a five-to-four decision, upheld the prosecution of a United States Senator on a charge of receiving unlawful compensation "from the Rialto Grain and Securities Co." despite his previous acquittal on a charge arising from the same transaction for receiving unlawful compensation from one "Mahaney", described in the first indictment as an officer and employee of the Rialto Grain and Securities Co. The Court applied a "separate evidence" test and found that different evidence was pleaded in the second indictment from that pleaded in the first.

*Burton* is not properly a dual violation case since but one statute was involved, but rather a case similar to *Rex* v. *Vandercomb and Abbott, supra*, where, to ameliorate rigid common law rules of criminal pleading, the Court permitted the prosecution a second trial if it could replead its legal theory or its evidence. *Burton* is doubtful authority in view of the recognition in later cases that the question is not whether new evidence has been pleaded, but whether the second *offense* charged is different in the sense that different evidence is required to prove its violation.

*Gavieres* v. *United States*, 220 U.S. 338 (1911)

This Court next applied its different evidence test to uphold, against a contention of double jeopardy, punishment imposed for "insult to a public official" despite a previous conviction of the defendant upon the same conduct under a statute prohibiting "indecent behavior in a public place."

The decision is consistent with the suggested "distinct evil" inquiry; there are obviously distinct and different public evils and interests involved in prohibiting breaches of the public peace and in protecting officials from harassment in the exercise of their duties.

*Morgan* v. *Devine*, 237 U.S. 632 (1915)

In *Morgan*, the Court found no double jeopardy in separate punishment for violation of two statutes—one for breaking and entering a Post Office with intent to steal and the other for the ensuing theft.

This decision appears inconsistent with the increasing tendency towards merger of antecedent steps in the consummated act. See Section 1.08(1)(b), A.L.I., Administration of the Criminal Law, Model Penal Code (Tentative Draft No. 5, 1956); *Prince* v. *United States*, 352 U.S. 322. It is difficult to reconcile *Morgan* with the suggested distinct evil standard except perhaps on the basis of the accepted distinction between the common law offenses of burglary and larceny.

*Albrecht* v. *United States*, 273 U.S. 1 (1927)

In *Albrecht*, this Court, per Mr. Justice Brandeis, held (at p. 11) as follows:

> ". . . The contention is that there was double punishment because the liquor which the defendants were convicted for having sold is the same that they were convicted for having possessed. But possessing and selling are distinct offenses. One may obviously possess without selling, and one may sell and cause to be delivered a thing of which he has never had possession, or one may have possession and later sell, as appears to have been done in this case. The fact that the person sells the liquor which he possessed does not render the possession and the sale necessarily a single offense. There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction."

This decision is difficult to reconcile with the suggested test since no distinct evil or interest appears in prohibiting possession and prohibiting sale. The A.L.I. Model Penal Code previously cited appears to go contrary to this decision.

*Blockburger* v. *United States,* 284 U.S. 299 (1932).

In *Blockburger,* the Court upheld multiple punishment for sale of narcotics, (1) not in the form of the original stamped package, and (2) without written order of the buyer on an Internal Revenue form. There was no constitutional objection made in this Court and the Court made no reference to the constitutional issue. This case is fully discussed in the text of this Brief. Adoption of the suggested test would require that it be overruled.

*Pinkerton* v. *United States,* 328 U.S. 640 (1946)

In *Pinkerton,* the Court reviewed and reaffirmed the doctrine that the substantive consummated offense may be punished separately from the conspiracy to accomplish it. This decision may be reconciled with the suggested test on the basis of the distinct evil inhering in group wrong-doing. See Brief for the United States, *Pinkerton* v. *United States,* No. 719, October Term, 1945, p. 33.

*American Tobacco Co.* v. *United States,* 328 U.S. 781 (1946)

In *American Tobacco,* this Court held distinct offenses were charged for double jeopardy purposes by conspiracy charges under Section 1 and Section 2 of the Sherman Act, "although the objects of the conspiracy may partially overlap." It also upheld prosecution on a charge of monopolization as well as a charge of conspiracy to monopolize.

The distinction between the monopolization and the conspiracy to monopolize may be justified by the long recognized distinct social interest in prevention of group wrong-doing. And as concerns Sections 1 and 2, Congress appears to have aimed at different evils in prohibiting conspiracy to restrain trade and in prohibiting conspiracy to monopolize. Conspiracies and agreements in restraint of trade falling short of monopoly, result in the distinct evil of subjecting

the public to artificially created impairment of the free market, tending to deprive the public of the benefits of freely and competitively established prices and qualities.

*United States* v. *Michener*, 331 U.S. 789 (1947)

In *Michener*, the Government sought review of a decision precluding multiple punishment both for the possession and the manufacture of a counterfeiting plate. This Court reversed per curiam, citing *Blockburger*, *Albrecht* and *Gavieres*, three Justices dissenting.

The case is very close to the factual situation in *Albrecht* and is to the same extent inconsistent with the distinct evil test.

*United States* v. *Bayer*, 331 U.S. 532 (1947)

In *Bayer*, this Court upheld punishment both for the conspiracy to deprive the Government of the faithful services of an Army officer and for the consummated substantive offense.

The decision seems consistent with the distinct evil standard in view of the distinct social interest in prevention of group wrong-doing.

*Pereira* v. *United States*, 347 U.S. 1 (1954)

In *Pereira*, this Court reaffirmed its doctrine that the consummated substantive offense may be punished separately from the conspiracy to commit. The Court emphasized the traditional distinction which seems to render the case consistent with the distinct evil test, that the unique element of conspiracy is the agreement to accomplish an unlawful end by concerted action.

## Appendix "B"

UNITED STATES DEPARTMENT OF JUSTICE

Address all mail to
U.S. Attorney

Office of the
UNITED STATES ATTORNEY
District of Columbia
WASHINGTON 1, D. C.

In Reply, Please Refer
to Initials and Number
LAR:FGS:jtb
Cr. #1265-52

April 5, 1956

Mr. Paul F. Pegelow
Superintendent
District of Columbia Reformatory
Lorton, Virginia

Dear Mr. Pegelow:

This office recently received a letter from an inmate, one James S. Turner, Reg. #15636, regarding certain aspects of the Boggs Act, 26 USC 7237, and its application upon conviction for various violations of the narcotic statutes.

It would be appreciated if this prisoner as well as others who might be interested, were informed that a person convicted of a violation of any one or more of the following provisions 26 USC 4704a, 4705a, or 21 USC 174, is a first offender under that statute. When a person so convicted is sentenced any subsequent conviction of any one or more of the above penal sections, makes him a second offender.

Prisoners fail to recognize the distinction between the various penal statutes which are required to be proved. Thus, a peddler of narcotics, while he might by lay persons

be thought to have committed only a single offense by a sale of heroin, actually he has violated three penal statutes. Should it be interpreted that such convictions would subject the defendant to the punishment of a sentence as a third offender, manifestly, a seller of heroin convicted of all three charges could never be treated as a first offender and would render the penal provisions of the Boggs Act inapplicable to a seller of heroin. It is believed that the statute must be, and it has been, so interpreted as to give full effect to all its provisions. This is achieved by treating a person convicted of all three statutes in one indictment who has not previously been convicted of any violation of a federal narcotic statute, as a first offender, regardless of the number of counts contained in the indictment.

This explanation should answer the prisoner's questions, however, it is recognized that it quite probably will remain unpalatable to those so convicted.

Very truly yours,

LEO A. ROVER
*United States Attorney*

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# In the Supreme Court of the United States

OCTOBER TERM, 1957

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McKINLEY E. GOSS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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J. LEE RANKIN,
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# In the Supreme Court of the United States

OCTOBER TERM, 1957

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No. 668

MCKINLEY E. GORE, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The opinions in the Court of Appeals are reported at 244 F. 2d 763.

### JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 1957 (R. 18-19). The petition for a writ of certiorari was filed on July 5, 1957, and was granted on December 16, 1957 (R. 19). 355 U.S. 903. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether three consecutive sentences could properly be imposed for narcotics offenses where the indictment contained six counts, the first three of which related to

a single sale of narcotics and alleged one offense against the Narcotic Drug Import and Export Act, one offense against the Internal Revenue Code's stamped package requirement, and one offense against the Internal Revenue Code's requirement of a written order form, and the next three counts charged similar offenses with respect to a separate sale of narcotics on a different day.

STATUTES INVOLVED

The Narcotic Drugs Import and Export Act, Sec. 2(c), 65 Stat. 767 (21 U.S.C. 174):

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years. * * *

The Internal Revenue Code of 1954, Sections 4704(a), 4705(a), 7237(a), 68A Stat. 550-551, 860, as

amended, 69 Stat. 3 (26 U.S.C. Supp. III, 4704(a), 4705(a), 7237(a)):

Sec. 4704. *Packages.*

(a) *General Requirement.*—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Sec. 4705. *Order Forms.*

(a) *General Requirement.*—It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

Sec. 7237. *Violation of laws relating to Narcotic Drugs and to Marihuana.*

(a) *Violation of Law Relating to Opium and Coca Leaves and Marihuana.*—Whoever commits an offense or conspires to commit an offense described in part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided [such as sections 4704(a) and 4705(a), *supra*], shall be fined not more than $2,000 and imprisoned not less than 2 or more than 5 years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less

than 5 or more than 10 years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than 10 or more than 20 years. * * * .

STATEMENT

In a six-count indictment returned on May 9, 1955, in the United States District Court for the District of Columbia, petitioner was charged with narcotics offenses as follows: Count 1—sale, on February 26, 1955, of 20 capsules of heroin and 3 capsules of cocaine not in pursuance of a written order (in violation of Section 4705(a) of the Internal Revenue Code); Count 2—purchase, sale, dispensing, and distribution of these drugs, on that date, not in or from the original stamped package (in violation of Section 4704 of the Internal Revenue Code); and Count 3—facilitating the concealment and sale of the heroin on that date, with knowledge that it had been unlawfully imported (in violation of the Narcotic Drugs Import and Export Act, Section 2(c)). Counts 4, 5, and 6 charged violations of the same provisions, respectively, on February 28, 1955, with respect to 35 capsules of heroin (R. 1-3).

The government presented the testimony of a federal undercover narcotics agent that, in company with an addict, he went to petitioner's apartment on February 26, 1955, at about 7:15 p.m., where a purchase of the narcotics was arranged with petitioner and payment made; that petitioner left the apartment and returned about an hour later and delivered the narcotics to the agent in an unstamped envelope, without use of any order form; and that substantially similar events took place two days later, on February 28. Another federal agent testified to having watched petitioner leave and

return to his apartment on February 28, 1955, at the times stated by the first agent. Petitioner testified, *inter alia*, that he had been ill and had not left the apartment on February 26; that he had suspected the particular addict as an informer and had refused his request for narcotics; and that he had not been at his apartment on the evening of February 28, 1955.[1]

Upon trial by jury, petitioner was found guilty as charged (R. 4). A fine of $500 was imposed by Judge Youngdahl on each count, and suspended. Sentences of imprisonment for a term of one to five years were also imposed on each count, the sentences on the first three counts to run consecutively, and the sentences on the remaining three counts to run concurrently with those on the first three counts (R. 4-5). The total sentence was three to fifteen years.

On March 24, 1956, petitioner filed a motion under 28 U.S.C. 2255 to vacate sentence, contending that the consecutive sentences imposed under the first three counts, resulting in a cumulative sentence of from three to fifteen years, were in excess of the maximum authorized by law (R. 5-8). The motion was denied (R. 8). The Court of Appeals affirmed, Circuit Judges Bazelon and Fahy concurring on the authority of *Blockburger* v. *United States*, 284 U.S. 299, but expressing doubt whether they would reach that result if they were not bound by that decision.

## SUMMARY OF ARGUMENT

Petitioner does not dispute that the decision in *Blockburger* v. *United States*, 284 U.S. 299, in 1932, permits the imposition of consecutive sentences for

[1] The testimony appears in the certified record of the official court reporter, lodged with the Clerk of this Court.

violation of three different provisions relating to narcotics, even if, in a particular factual situation, the three offenses were committed by one act of sale. In that and other cases, this Court has hitherto found it appropriate, for purposes of both statutory interpretation and double jeopardy, to determine what the offenses are as defined by Congress in general, and not by examining into the manner in which the offenses were committed in the particular case. If the consequence of the offenses being held separate is deemed too harsh, the Court said "* * * the remedy must be afforded by act of Congress * * * ." 284 U.S. at 305. Thus, although suggesting that Congress might see fit to change the statutes, the Court has left the question of whether multiple sentences should be imposed, where the offenses are closely related but still separate, for consideration by the sentencing judge in the light of all the facts. That, we submit, is where the matter should rest unless Congress dictates otherwise.

## I

A. Petitioner's argument that *Blockburger* was incorrectly decided as a matter of statutory interpretation is unsound. The three offenses here involved came into the law at different times and serve different purposes, even if their general and ultimate aim was to prohibit dealings in narcotics through unrecognized channels. Almost any criminal statute has one ultimate aim as, for example, the statute relating to counterfeiting has the aim of preventing the circulation of counterfeit money. This does not mean that Congress could not properly create and treat as separate offenses

the making of counterfeit money, the possession of counterfeit money, and the passing of such money. The fact that those three offenses may occur at the same time and place is one which the sentencing judges should and do consider in exercising their discretion in imposing sentence, but we do not think it can be said that the three offenses are one and the same.

The situation is similar in this case. The Export-Import Act, passed in 1909, aims at preventing the initial step of importation of opium and dealing with unlawfully imported opium. It covers, not only sale as such, but transporting, concealing and facilitating the transportation of imported opium products. In 1914, Congress felt that this import legislation needed supplementing by federal internal revenue regulation. It therefore provided in the Harrison Act of 1914 for an annual tax and the use of a written order form. This statute serves the direct purpose of channelizing the traffic into licensed hands by forbidding unlicensed sales. It is roughly equivalent to a provision requiring the filing of an income tax return, even if a tax is not due in a particular year. Then, in 1919, Congress passed the stamp tax requirement, which imposes a tax directly on the narcotics and is the direct means of collecting revenue. It applies, not only to sales, but to purchases as well. Thus, the immediate objectives of the three statutes are all different. The fact that these three purposes may, in a particular case, be violated by one act of sale does not make the offenses unitary. Whatever influence the fact that there is only one sale should have upon the exercise of the sentencing judge's discretion, the three offenses as such are still separate and different.

Although the Court in *Blockburger* did not undertake any extensive discussion of the legislative history, the decision in *Nigro* v. *United States*, 276 U.S. 332, decided shortly before and cited in *Blockburger*, reveals full awareness of the legislative history and the differing purposes of the separate requirements of the narcotics laws.

B. Amendments to the narcotics laws subsequent to the *Blockburger* decision have merely increased the penalties, and have not changed the character of the offenses proscribed. The fact that Congress prescribed a heavier sentence for subsequent offenders certainly does not show that it considered that the initial offense would be unitary, no matter how many statutes were violated. The character of the offenses as separate depends on *what* is proscribed; the increased penalty depends on *when* the offenses are committed, *i.e.*, whether they are committed subsequent to a prior conviction or convictions. Even if the first conviction resulted from six clearly separate offenses—*e.g.*, six widely separated acts of sale—it would be a first conviction for recidivist penalty purposes. Hence, the provision for heavier penalties for subsequent violators—persons who had previously been punished or given an opportunity to reform—does not bear on the separate character of the offenses as such.

The Boggs Act of 1951, applicable here, and the subsequently enacted Narcotic Control Law of 1956 were both directed at increasing *minimum* sentences, not at mitigating any possible harsh results from multiple offenses. To the extent that Congress separately amended the penalties of both the import act and the revenue code (and in the 1956 Act differentiated the

penalties for internal revenue act offenses) it gave tacit recognition to the separateness of the offenses. Various language changes and statements in the reports also support the view that Congress treated each offense as separate. Thus, if the subsequent legislative history has any impact on the *Blockburger* decision it must be read as a reaffirmation of that ruling.

## II

In arguing that, if the offenses are not separate as a matter of statutory construction, they must be held unitary to avoid violation of the constitutional prohibition against double jeopardy, petitioner is admittedly asking this Court to reconsider a long line of its decisions to the effect that there is no violation of the double jeopardy clause if the offenses as such are different, no matter how closely related in actual fact. Although petitioner couches his suggestion in terms of asking this Court to reconsider the accepted test for measuring identity of offenses, he is really asking for a more fundamental change in the approach to the problem.

*Blockburger* and other decisions of this Court in this field, whether phrased in terms of statutory interpretation or of double jeopardy, rest on the concept that issues of multiplicity of offenses are to be determined from the *elements* of the *offenses* as defined in the statute, without relation to the particular circumstances under which the particular crime was committed. If, for example, possession and sale of a forbidden article can in *any* circumstances be factually different offenses—and of course they can be—the Court has not considered it of significance (in the context of double jeopardy) whether, in a particular case, the proof of possession is co-extensive with proof of the act of sale. None of

the later decisions of this Court, which have interpreted the unit of the offense under particular statutes more broadly than was done in prior decisions under other statutes, has departed from this principle—that the *offenses as defined* by Congress are controlling, and not the particular circumstances under which the offenses happened to be committed. The latter factors are for consideration by the sentencing judge alone.

As to retrial after acquittal, this Court, in *Sealfon* v. *United States*, 332 U.S. 575, has in practical effect made the factual closeness of particular offenses a significant factor, not by upsetting long established rules of double jeopardy (which indeed that decision reaffirmed) but by a liberalized interpretation of principles of *res judicata*. The reason that there has been no equivalent modification with relation to consecutive sentences for related offenses, where the offenses are committed by one act, stems (among other reasons) from the fact that the matter is best handled by the sentencing judge. Although it is accepted and sound practice for the government to charge a single transaction in multiple counts, in the absence of aggravating circumstances consecutive sentences are not generally imposed for one act. Since the cases where such sentences are imposed are the ones most frequently litigated, the problem tends, at the appellate level, to appear more acute than it actually is. Even where sentencing judges have imposed consecutive sentences despite a close relationship of counts to each other, it will often be found that the total sentence can be sustained on the basis of clearly separate transactions. For example, here petitioner made two sales on different days, so that two of his three consecutive sentences are valid on any theory. As to the third, the evidence

indicates that in each instance petitioner not only made a sale, but actually transported the narcotics as well.

As we have said, *Blockburger* and the other decisions of this Court, in effect, left it to the sentencing judge to decide whether, on the particular facts, multiple sentences should be imposed for closely related offenses arising out of one or more closely related acts. Petitioner's entire argument, upon analysis, resolves itself into a contention that, on the particular facts of his case, the sentence is unfair. That is not, we submit, a basis for overturning long established principles of statutory interpretation in the field of criminal law, or for construing anew the constitutional doctrine of double jeopardy.

## ARGUMENT

### Introduction

As the court below has held, and as petitioner admits, the decision of this Court in *Blockburger* v. *United States*, 284 U.S. 299, permits the imposition of consecutive sentences on counts 1, 2 and 3, even assuming *arguendo* that all three sentences are founded on one act of sale. In *Blockburger*, the Court found that the provisions of the Harrison Narcotic Act (38 Stat. 785, as amended) making unlawful, respectively, the sale of drugs not in or from the stamped package, and sale not in pursuance of a written order, created two separate and distinct offenses punishable by separate penalties —and this in spite of the fact that there was but one sale—since each offense required proof of a different element. The Court said (284 U.S. at 305): "The plain meaning of the provision is that each offense is subject to the penalty prescribed; and if that be too harsh, the remedy must be afforded by act of Congress.

not by judicial legislation under the guise of construction."

Although, as we show *infra*, pp. 27-37, Congress has not altered the separate nature of the offenses, petitioner now asks this Court to overrule *Blockburger*,[2] first as a matter of legislative interpretation, and, alternatively, on the basis of the constitutional prohibition against double jeopardy. But we do not find that *Blockburger* was written without awareness of the legislative history or purposes of the statutes involved (see *infra*, pp. 20-23), and we are unable to see any basis for overruling *Blockburger* in the legislative history of the narcotics statutes, either prior or subsequent to that decision. As for petitioner's contentions with respect to double jeopardy, he is admittedly asking this Court to overrule a long line of decisions, antedating *Blockburger* and reaffirmed since, many of which were written by or participated in by the most eminent members of the Court. Those holdings are all to the effect that there is no double jeopardy if the offenses as defined by Congress are separate, regardless of the origin of those separate offenses in a single act or transaction or a series of closely related acts or transactions. In effect, the decisions have left it to the sentencing judge to decide whether consecutive sentences should be imposed where, under the particular facts of a particular case, multiple offenses are committed by one act or series of acts. That is where, we submit, the issue should rest unless and until Congress alters the legislation.

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[2] The opinion in *Blockburger*, decided in 1932, was written for a unanimous Court by Justice Sutherland. Participating in the decision were Chief Justice Hughes and Justices Holmes, Van Devanter, McReynolds, Brandeis, Butler, Stone and Roberts.

## I

**The Three Narcotics Offenses Are Separate Since the Three Prohibitions Originated in Separate Enactments, in the Years 1909, 1914, and 1919 Respectively, and the Elements are Different, Each Imposing Separate Kinds of Duties Having Different Purposes.**

In *Blockburger* v. *United States*, 284 U.S. 299, the defendant was found guilty of a sale of narcotics that violated both the prohibition against sale not in or from the stamped package and the prohibition against sale without the prescribed written order form—two provisions also involved in the instant case. Consecutive sentences of five years' imprisonment and fines of $2,000 were imposed upon each count (284 U.S. at 301), and Blockburger contended, substantially as petitioner contends here, that the violations charged in the several counts "constitute but one offense for which only a single penalty lawfully may be imposed" (*ibid.*). This Court rejected the contention, holding instead (284 U.S. at 304):

> The statute is not aimed at sales of the forbidden drugs *qua* sales, a matter entirely beyond the authority of Congress, but at sales of such drugs in violation of the requirements set forth in §§ 1 and 2, enacted as aids to the enforcement of the stamp tax imposed by the act. See *Alston* v. *United States*, 274 U.S. 289, 294; *Nigro* v. *United States*, 276 U.S. 332, 341, 345, 351.

Petitioner attacks this holding, as a matter of legislative interpretation, arguing that *Blockburger* did not consider the prior legislative history of the statute which shows that its basic aim was to suppress the narcotics traffic. He argues that, since that was the evil at which Congress was aiming, one act of sale should

also have been held, as a matter of Congressional intent, to be only one evil and therefore only one offense.

The argument as to the Court's lack of consideration of the prior legislative history is as we show *infra*, pp. 20-22, answered by the Court's reference in *Blockburger* to *Nigro* v. *United States*, 276 U.S. 332, in which seven of the same members of the Court had participated. The briefs and decisions in *Nigro* both contain extensive legislative history (276 U.S. at 335, 340-344) and detailed analysis of the differentiated objectives of the provisions (276 U.S. at 341, 345, 351). Accordingly, it cannot be assumed, as petitioner implies, that the then Court—25 years closer to the basic legislation than we are today—was unaware of the separate origins and purposes of the respective enactments or was led into error by the revenue basis on which federal jurisdiction of the two provisions was founded.

More fundamentally, however, we are unable to find much strength in the argument which is rested on the fact that the two statutes involved in *Blockburger*, although clothed in the form of revenue measures, were both aimed at outlawing sales of narcotics except through recognized channels. Almost any criminal statute dealing with a particular field has such an essentially "unitary" purpose, but that does not prevent separate offenses from being enacted by Congress. The prohibition statute involved in *Albrecht* v. *United States*, 273 U.S. 1 (an opinion by Justice Brandeis, holding possession and sale separate offenses) was aimed at preventing the sales of liquor except through recognized channels in a field in which Congress had complete authority regardless of any revenue founda-

tion. The bribery statute involved in *Burton* v. *United States*, 202 U.S. 344 (involving agreement to take a bribe, and bribery) was aimed at preventing the taking of bribes. The counterfeit statute involved in *United States* v. *Michener*, 331 U.S. 789 (making a plate for counterfeiting, and possessing the plate) was aimed at preventing the circulation of counterfeit; another area in which Congress has full power over the field. As those decisions show, this does not mean that Congress may or does impose only one punishment for all the various acts that can be done to defeat the single general Congressional purpose. Certainly, for example, Congress had the right to, and did, consider the making of counterfeit one evil, and the passing of counterfeit (whether by the maker or by someone else) a separate act and a separate evil punishable as a separate offense. The government is substantially and separately injured when each of its requirements directed toward enforcement of the desired end is violated. That, as we show below (*infra*, pp. 17-26), is the situation here.

Each of the statutes involved in this case was designed to serve a specific Congressional objective. And while, undoubtedly, an ultimate objective of each of those requirements was suppression of illegal traffic in narcotics, the flouting of any one of the prohibitions adopted by Congress to reach that ultimate goal is a separate evil and a separate injury. If, in making a sale of narcotics, the seller assaulted a government officer, the assault would clearly be a separate offense from the sale, although the purpose of the assault was only to effectuate the sale. The situation here is less dramatic but not different. To make a sale,

petitioner did at least three things which Congress has said he should not do. He thus committed three offenses against the government. Violation of one of the offenses did not give him an immunity to violate the other two.

The question relates to the offenses which Congress has defined, and not the origin of those offenses in any particular set of facts. When a legislature deals with two separate evils—such as the disorderly conduct and insulting a public official involved in *Gavieres* v. *United States*, 220 U.S. 338—it obviously is not thinking about the fact that in some particular case one person may commit both offenses by one act. Murder and rape can be committed by one act, but a legislature would not normally consider that possibility in fixing the penalty for each crime. That is true of more closely related evils such as the making of a counterfeiting plate and the possession of the plate involved in *United States* v. *Michener*, 331 U.S. 789. Possession of counterfeiting equipment is an evil and the making of counterfeit is another evil—whether they happen to occur at the same time, or at different times, and whether they are done by one person or by two separately. A legislature defines offenses and imposes penalties generally. As to the *unit* of the crime—*e.g.*, whether transportation as such or transportation of each woman for immoral purposes is the punishable act (see *Bell* v. *United States*, 349 U.S. 81)—the intent of the legislature may often be deduced from the language of the statute or its particular legislative history. But where Congress has defined different offenses to serve different purposes, there is seldom likely to be any specific indication of what Congress intended with respect to a particular

factual variant where the two offenses happen to be committed by one act.[3] Thus, in considering the offenses *as defined by Congress*, it normally serves no useful purpose to stress the fact that, in a particular case, several offenses may be committed by one act. The intent of Congress unquestionably is that *all* its requirements be obeyed, and therefore it establishes separate prohibitions and separate penalties. When the offenses happen to arise out of the same set of facts the problem is not one of statutory interpretations or of redefining the offense. The problem is one of sentencing; only the sentencing judge is in a position to apply the punishments Congress has prescribed to a particular fact situation and a particular defendant in a manner which will best promote the ends of justice.

A. *The three narcotics provisions have distinct functions in the enforcement of the ultimate end of suppressing the illegal traffic in narcotics.*

The three provisions here violated include not only the two involved in *Blockburger* v. *United States*, *supra*, but a third, further differentiated in that it was not a revenue provision but a part of the statute controlling imports. The three provisions appeared at periods separated from one another by a half-decade in each case—in 1909, the prohibition against imports (35 Stat. 614); in 1914, the prohibition against dealings without the written order form of the person acquiring the narcotics; and in 1919, the prohibition against dealings

[3] As this Court noted in *Prince* v. *United States*, 352 U.S. 322, the legislative history of the bank robbery statute there involved was in many ways unique.

not in or from a stamped package.[4] Each serves a distinct purpose.

1. *The 1909 import statute.* The 1909 statute (35 Stat. 614), as originally enacted, embodied the basic aspects of the present statute. It prohibited importation and imposed a penalty of a $50 to $5,000 fine and/or imprisonment not exceeding two years for receiving, buying, selling, or in any manner facilitating the transportation, concealment, or sale of opium, knowing the importation to have been unlawful, and it stated the presumption that unexplained possession constituted sufficient evidence to authorize conviction.[5]

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[4] Petitioner (Pet. Br. 20) combines under a single heading—The Harrison Anti-Narcotic Act—the enactment of 1914, as to the unstamped package prohibition, and an enactment of 1919, imposing different duties thus providing occasion for correspondingly different offenses. Similarly, in the chart on page 22a of his brief, petitioner, while indicating that the import offense originated in a 1909 enactment, fails to stagger appropriately the 1914 and 1919 origins of the prohibitions, respectively, against dealings in unstamped packages and against dealings without written order forms, placing them together under the single caption "BASIC 1914 LEGISLATION" and making no reference to the 1919 enactment, despite references to other enactments of considerably less significance.

In his chronological review of the various enactments (Pet. Br. 20), petitioner again includes discussion of the stamp tax provision under the 1914 legislation, and makes no mention of the 1919 legislation which first created the prohibition against dealings in unstamped packages.

[5] The 1909 statute was supplemented by the Act of January 17, 1914 (38 Stat. 275), adding presumptions as to the date of importation, and penalties and presumptions with reference to presence of the drugs on vessels and railroad cars, and transportation of smoking opium.

2. *The 1914 written order form requirement.* The separate offense with respect to sale without order forms appeared with the enactment of the so-called Harrison Act in December 1914 (38 Stat. 785). Every person producing, importing, dealing in, selling, or giving opium or coca drugs was required to register with the collector of internal revenue and pay an annual tax of $1. Section 2 of this enactment established the requirement of an order form, as prescribed by the government, and a penalty for failure to employ the form. All laws relating to collection of internal-revenue taxes were made applicable to the special tax imposed upon registered dispensers of the drugs (Sec. 7; 38 Stat. 789). Possession by "any person not registered" who had not paid the special registration tax was also declared unlawful (Sec. 8; 38 Stat. 789).

Penalties of imprisonment not to exceed 5 years and/or a fine of not more than $2,000 were imposed for violations of "this Act." Specific provision was made that nothing in the Act should "impair, alter, amend, or repeal any of the provisions of" the 1909 Act prohibiting importation and use of opium (Secs. 9, 12; 38 Stat. 789-790).

The enactment of the 1914 legislation had been preceded by a vigorous message from the President (House Doc. No. 33, 63d Cong., 1st Sess., April 21, 1913), pointing out that, while other nations had supplemented the international prohibitions against the drug traffic with domestic legislation, the United States,

since the 1909 opium-exclusion act, had taken no further definite action for "Federal control" of the drug traffic "in the United States."[6]

The report of the House Ways and Means Committee (H. Rep. No. 23, 63d Cong., 1st Sess. to accompany H. R. 6282, June 24, 1913) reviewed the excessive importation of narcotic drugs and, adverting to the 1909 opium-exclusion statute, stated the need of additional legislation to secure more certain federal control of the importation "and interstate traffic" in narcotics (p. 3). The report, like the statute itself, specifically stated that "nothing in this act is to interfere with the pure-food law and the opium-exclusion act" (p. 4).[7]

3. *The 1919 stamp tax requirement.* By the Act of February 24, 1919 (40 Stat. 1130), Congress provided for a stamp tax of one cent per ounce and made unlawful the purchase, sale, dispensing, or distributing of the narcotic drugs unless in or from the stamped package.[8] The occasion for the additional tax was the decision in *United States* v. *Jin Fuey Moy*, 241 U. S. 394, which limited the effectiveness of the 1914 Act by holding that Section 8, punishing the possession of narcotics by "any person not registered", did not apply to

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[6] A bill regulating narcotic drugs within the United States and imposing a tax had been urged upon Congress since March 1910 as a necessary step in the participation of the United States in the international drug agreements (Sen. Doc. No. 157, 63d Cong., 1st Sess., Aug. 9, 1913, p. 87).

[7] The report of the Senate Committee on Finance (S. Rep. No. 258, 63d Cong., 2d Sess., February 18, 1914) adopted the House report, *supra*, in its entirety (pp. 3-4).

[8] The special annual tax, in addition, was raised to a maximum of $24.

a person who was not in the class required to register. Congress in 1919 imposed the new and further duty to pay a tax evidenced by a stamp on the drugs themselves and, in enforcement thereof, stated the presumption that possession of an unstamped package indicated an offense under this provision (H. Rep. No. 767, 65th Cong., 2d Sess., September 3, 1918, p. 36; S. Rep. No. 617, 65th Cong., 3d Sess., December 6, 1918, p. 56).

In *Nigro* v. *United States*, 276 U. S. 332, which came before this Court after the 1919 amendment, the defendant had been indicted for selling morphine without a written order form. The argument was made that the penalties for selling without a written form should be limited to persons required to register (as the *Jin Fuey Moy* decision had held with respect to the penalty for possession). After noting the argument that "it would be superfluous to include persons selling opium who are not registered because they are denounced as criminals by the first section for selling without registration", this Court, in an opinion by Chief Justice Taft, said, "That is no reason why they may not be included under a second reasonable restriction enforceable by punishment." (276 U. S. at 344) And it added (276 U. S. at 345):

> It would seem to be admissible and wise, in a law seeking to impose taxes for the sale of an elusive subject, to require conformity to a prescribed method of sale and delivery calculated to disclose or make more difficult any escape from the tax. If this may be done, *any departure from the steps enjoined may be punished*, and added penalties may be fixed for successive omissions, but all for

the one ultimate purpose of making it difficult to sell opium or other narcotics without registering or paying the tax. [Emphasis added.]

The Court further noted that, at the time of its decision, the stamp tax had been imposed (276 U. S. at 346-347). It stated:

> By the amendment of § 1 [in 1919], much higher occupation taxes were imposed, and they vary in amount for producers and manufacturers and for wholesale and retail dealers and for physicians. More than that, an excise tax of one cent per ounce of the drug is imposed and payment thereof is to be evidenced by stamps attached to the bottle or box containing the drug, and the sale of the drug from anything but a stamped bottle or container is punishable. The provision for order forms is thus useful under the amended section, and there is therefore still reason for holding the provisions of § 2 to apply to all persons so as to be helpful in promoting detection of evasion from the added tax imposed under the new § 1. *The two tax provisions of that section would be much less effective if a purchaser of drugs from an unregistered dealer is not required to furnish an order form.* The purchaser may be himself one who should register, but has not done so, or he may be dealing in and selling the drug on which the stamp tax has not been paid, and it is just as important that sales by an unregistered dealer should be punished, unless made on a prescribed form, as that sales by registered dealers should be subject to penalty. [Emphasis added.]

As we have noted, in the face of this decision (rendered very shortly before *Blockburger*), it cannot be said that the Court in *Blockburger* was unaware of the legislative history of the provisions of the statutes before it. And as the *Nigro* decision points out, each of the statutes involved in *Blockburger* serves a different purpose in enforcement of the measures regulating narcotics. As for petitioner's argument that there is no revenue purpose to the legislation, it may be noted that, as found in *Nigro* v. *United States*, 276 U. S. at 339, revenue does result from the legislation. The statute actually produced more than two million dollars in revenue during the year 1950, preceding the enactment of the Boggs Act.[9] The fact that more revenue might be obtained if transactions in narcotics were not limited does not alter the fact that the requirements serve a legitimate function. In measures which have a purely tax function without any other social purpose, the government normally requires persons to register in some form as well as to pay the tax. See *United States* v. *Kahriger*, 345 U. S. 22, 31. Obviously, for example, the government has an interest in requiring that persons who should file income tax returns do so, whether or not a tax must be paid in any particular year. Hence, failure to file a return and evasion of taxes are two

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[9] Report of the United States Treasury Department, Bureau of Narcotics, *Traffic in Opium and Other Dangerous Drugs*, for the year ended December, 1950, p. 7:

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|---|---|
| Customs duties on opium released for civilian uses .. | $865,820.87 |
| Customs duties on coca leaves imported ..... | 12,427.75 |
| Internal Revenue collections—registrations, tax stamps, order forms on opium, coca leaves, and marihuana ..... | 824,555.02 |
| Paid fines and compromises ..... | 46,076.09 |
| Value of vehicles forfeited ..... | 329,173.76 |
| Total ..... | $2,078,053.49 |

separate injuries to the government, two separate offenses (cf. 26 U.S.C., Supp. V, 7201; 7203)—regardless of whether, in a particular case, failure to file may also be a means of tax evasion. And this remains true whether the ultimate object of the legislation is revenue or regulation.

In sum, each of the statutes here involved serves a different function. The 1909 Act aims at preventing the initial step of importation of opium and dealing with imported opium. It covers, not only sale as such, but transporting, concealing and facilitating the transportation of imported opium products. The written order form of the Harrison Narcotic Act is aimed at channeling domestic trade into proper channels by requiring that no narcotics be sold except pursuant to the prescribed order form. It is the means by which legally imported narcotics can be traced from importation to ultimate use, even by a physician whose use of an abnormal number of forms may serve as a reason for investigation. See *Direct Sales Co.* v. *United States*, 319 U. S. 703. The stamp tax requirement is a means of collecting revenue, and applies, not only to sale, but to purchase and distribution without the required stamp. It is the most immediate means of identifying illicit narcotics; the absence of a stamp showing the illegal character without the necessity of checking on order forms. The fact that all these three purposes have, in any particular case, been vitiated by one act of sale does not transform the separate purpose of the three separate pieces of legislation into one unitary objective. Whatever the consequences of the fact that there is one sale, the three offenses are different, not only in their elements, but in the immediate purpose of the three prohibitions.

In determining the separate character of the *offenses* as such, the issue is always whether the acts which Congress proscribed are—in their general character—separate. Whether the test employed is that of *Blockburger* (does each prohibition involve elements not present in the other?) or the test of whether each prohibition is directed at a separate evil, the result is the same. Dealing in unlawfully imported narcotics, failure to comply with the registration requirement which is designed to keep the traffic in proper channels, and failure to pay the tax that should have been paid on the narcotics themselves, have different elements and reach separate evils.

One who conceals a shipment of narcotics creates a constant threat that the narcotics will eventually be sold. The concealment creates problems for the federal agents tracing the shipment, distracting their energies and often exposing them to great dangers. If the threat of a separate punishment deters the possessor at least from passing the narcotic drugs on and thereby perhaps initiating another addict, there has been averted a further and distinct injury to the government. Further, if the threat of a separate offense and separate punishment deters a trafficker from dealing in any but stamped goods—albeit they are stolen—he poses one less injury to the body politic in that his loot may more easily be traced.[9a]

Congress may seek to avert a single general evil by a number of duties imposed upon citizens, and the violation of each such duty injures the United States in a

[9a] This is not an uncommon situation. In 1950 Congress amended the definition of contraband in 49 U.S.C. 781(b) to include narcotics acquired by theft, robbery, or burglary. 64 Stat. 427.

different respect. To adduce the singleness of the ultimate broad general purpose—eliminating the narcotics trade—as a basis for insisting that all ways of combating that evil must be cumulated as one offense is not only a novel suggestion in the field of criminal law, but an unworkable one if carried to its logical conclusion. It would almost permit the single and unprecise offense of "violation of laws" or, at least, "violation of narcotics laws".

Petitioner's argument, in all its variations, that "the purpose of Congress is amply served by a single conviction and sentence" (Pet. Br. 50), is answered by the ruling in *Blockburger* that this is a matter for Congressional determination. Congress chose to create these separate offenses before *Blockburger* and, as we shall show, to continue them thereafter. The offenses as such apply to many situations beyond a single act of sale and their nature as offenses does not change because, in a particular case, they are committed by one act. Whatever the influence the fact that, in a particular factual situation, three offenses are committed by one act should have upon the exercise of the sentencing judge's discretion, it does not alter the fact that Congress has defined three separate crimes, each requiring proof of a different element, and each serving a different function.[10]

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[10] Petitioner revives an argument (Pet. Br. 75) raised just prior to the *Blockburger* case, in *Ballerini* v. *Aderholt*, 44 F. 2d 352 (C.A. 5), *i.e.*, that because the respective statutes state a presumption of guilt from unexplained possession of the narcotics the offenses cannot be considered different. In *Blockburger*, this Court specifically stated (284 U. S. at 304), "The case of *Ballerini* v. *Aderholt*, * * * is disapproved." See *Corollo* v. *Dutton*, 63 F. 2d 7, 8 (C.A. 5), quoted with approval in *McDade* v. *United States*, 206 F. 2d 494, 495 (C.A. 6): "* * * This subdivision does not define the sub-

**B. *Amendments subsequent to the* Blockburger *decision have merely increased the penalties for each offense and have not changed the character of the offenses proscribed.***

As we read petitioner's brief, he is not arguing that, if *Blockburger* was correct at the time it was decided, the nature of the proscribed acts as establishing separate offenses has been changed by the subsequent legislation, which did not change the character of the offenses but merely increased and made distinctions as to penalties. Rather, petitioner seeks to find support in the later legislation for his view that *Blockburger* was incorrectly decided as a matter of legislative interpretation. We find nothing in the later legislation that casts doubt on the validity of the *Blockburger* holding that the offenses as such are separate. Despite the explicit invitation of this Court in *Blockburger* to Congress to reconsider the statute if it found the imposition of consecutive sentences too harsh (see pp. 11-12, *supra*), Congress directed its attention only to the necessity for *increasing* penalties. And in doing so, there seems to have been no reference to the *Blockburger* decision, although we think there is tacit indication that Con-

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stantive offenses; it deals with their proof. It merely makes proof of possession presumptive evidence, prima facie, of the facts essential to make out a case. While proof of possession operates with equal force under each count, the presumption which it raises is, as to each count, of the facts essential to conviction under it. It is to the statutes denouncing the offenses charged in each of the counts that we must look to determine whether the facts required in proof of each are the same. An examination of them shows that quite the contrary is true. The fact essential in proof of the second count is the purchase of morphine not in or from the original stamped package. The essential fact in the third count is the sale of morphine not in pursuance of a written order. The essential fact in the fourth count is knowingly receiving and concealing morphine which had been unlawfully imported into the United States."

gress was aware that each of the offenses was different. This becomes clear from a more detailed consideration of the subsequent amendments.

1. *The 1937 legislation increasing penalties in the case of second and subsequent offenders.*—By the Act of August 12, 1937 (50 Stat. 627), Congress provided that "a person who, after having been convicted of selling, importing, or exporting, or conspiring" to do so, did so again, should "upon conviction of such second offense" be fined not more than $5,000 and/or imprisoned for not more than ten years. Upon conviction of a "third offense, or any offense subsequent thereto", a fine of not more than $10,000 was provided, and/or imprisonment of not more than 20 years.

The committee reports, after noting the differing fines and sentences provided under the separate Harrison Act and the Narcotic Drugs Import and Export Act, stated in identical language (H. Rep. No. 1122; S. Rep. No. 88); 75th Cong., 1st Sess., p. 3, emphasis added):

> The size of the penalty depends in both instances upon *the nature of the offense*, but the fact of prior conviction is not made an element in either [of the prior acts].

Since, under the terms of the 1937 statute, a person did not become a second offender until "convicted" of an earlier offense, a person who committed the several offenses in a single transaction did not thereby become a second or third offender. The status of second or third offender created by this enactment is a concept wholly apart from the definitions of the *types* or *nature* of offenses. The character of the offense as separate depends on *what* was prohibited; the increased penalty depends on *when* the offenses were committed, *i.e.*,

whether they were committed after a prior conviction or convictions. Since the theory of increased penalties for subsequent offenders implies that there should be a motive and opportunity for reform after conviction, it is reasonable to treat the entire first conviction as one conviction for these second offender purposes. See *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, interpreting the phrase convicted "more than once" as used in the Immigration Act of 1917 in this fashion. But it would be stretching that concept far beyond its purpose to read into it a legislative overruling of the *Blockburger* rule. The first conviction in a particular case might involve a situation where a defendant purchased a large quantity of narcotics one day, hid them for several days, and then made a number of separate sales on different days. We do not think that petitioner would contend that this was only one offense for the purposes of sentencing on that original conviction, even if it was a first conviction for the purposes of the second offender statute.

2. *The Boggs Act of 1951.*—The first section of the Act known as the Boggs Act (65 Stat. 767) separately amended Section 2(c) of the Narcotic Drugs Import and Export Act. It made mandatory, for the first time, a *minimum* prison sentence of two years for the first offender, five years for the second offender, and ten years for the third offender, and also a fine of not to exceed $2,000 for all offenders. It set the maximum terms for first offenders at five years, for second offenders at ten years, and for third offenders at 20 years.

Section 2 of the Act *separately* amended Section 2557(b)(1) of the Internal Revenue Code, placing in

that section the mandatory minimums and the scale of maximums above set forth.[11]

a. The Boggs Act (65 Stat. 767) did not expressly refer to—much less overrule—the long-established *Blockburger* holding as to separate offenses. Its entire structure left all definitions and separations of offenses substantially as before. Indeed, the *separate* amendment of both the Import Act and the revenue code is in itself a significant, even if tacit, recognition of the separateness of the substantive offenses.

Moreover, while the Harrison Act, at the time of *Blockburger*, imposed its penalty upon a person who violated or failed to comply with *the Act*,[12] the Boggs Act imposes punishment upon one who "commits *an* offense" described in Part I (emphasis added). While we find no indication of conscious purpose in this change, we think that it is a further indirect indication of the Congressional recognition and acceptance of the *Blockburger* rule as to separate offenses. The added language concerning second offenders also speaks in singular, not plural, terms—"For a second offense, the offender shall be fined * * * and imprisoned * * *. For a third or subsequent offense, the offender shall be fined * * * and imprisoned * * *." Moreover, the statute

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[11] For the prior scales of *maximum* sentences and fines and their interrelationships under the Narcotic Drugs Import and Export Act, the Internal Revenue Code, and the provisions concerning second and subsequent offenses of selling, importing, exporting, and conspiring to do so, under the Act of August 12, 1937, as amended, see the comparative treatment at pp. 6-9, H. Rep. No. 635, 82d Cong., 1st Sess.

[12] This language was a ground urged in *Blockburger* for the view that the punishment was imposed upon the single act of violating rather than upon the several types of offense embodied in a single act. (284 U. S. at 305; Brief for the Petitioner in No. 374, O.T. 1931, pp. 14-15.)

specifies that a prior offense is a conviction for any one of specifically enumerated statutes, again indicating an awareness of the separate nature of the prohibitions.

b. The legislative history contains similar tacit indications that, although Congress was not specifically directing its attention to the problem, it assumed that each of the offenses was separate. The House report (H. Rep. No. 635, 82d Cong., 1st Sess.) summarized the then state of the law as providing criminal penalties for anyone who "imports" narcotics "or" who receives, conceals, buys, sells, "or" facilitates transportation, concealment, "or" sale after importation, and stated, "*Other* criminal penalties are provided for violations of the internal revenue laws relating to the taxes upon opium * * * and the occupational taxes upon distributors of narcotics and marihuana" (pp. 1-2; emphasis added).

The report characterized the bill as amending the narcotics law "and" internal revenue laws to provide greater uniformity of penalties for "serious" violations of "those" laws, by fixing maximum fines for "all" such offenses (p. 2).[13] Noteworthy also is the language (H. Rep., *supra*, p. 2) stating that the amendment of Section 2557(b)(1) of the Internal Revenue

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[13] The use in the House Report, p. 2, of language referring to the "first offense" in the singular in setting forth the maximum and minimum terms for that offense (*e.g.*, "maximum prison terms of from 2 to 5 years for the first offense") is patently not the same as if the reference had been to a first "act" or "transaction," nor is it ground for implying a new provision that each first *act*, possibly entailing two or three separate offenses, was now to be limited in its consequences so that the aggregate maximum for several offenses was now to be *reduced* to the maximum for a single offense.

Code (forerunner of the instant Section 7237 (a)) was designed to make "uniform" the possible penalties—using the plural form "penalties"—for "the several offenses" coming within the scope of that section. Chairman Boggs specifically stated that the bill would provide the "same" penalties for violations of "both" the "tax laws and the Narcotic Drugs Import and Export Act" (97 Cong. Rec. 8196).

c. The purpose of the Boggs Act, stated over and over again throughout the hearings, in the reports, and in the debates, was to *increase* penalties, for first as well as second offenders.

Two sections of the House report were headed "D. INADEQUACY OF PENALTIES UNDER EXISTING LAW," and "E. ANTICIPATED EFFECT OF INCREASING MAXIMUM PENALTIES AND IMPOSING MINIMUM PENALTIES FOR NARCOTICS VIOLATIONS." The text bristled with such terms and phrases as "increased penalties", "severe penalties", "mandatory penalties", "severe sentences", "strong long sentences", "[w]e would like to see the risks enhanced in this dirty business", and the committee stated (p. 4):

> It appears urgent, therefore, that steps be taken to increase penalties even to the extent of removing some discretion from the Federal judiciary * * *.[14]

The Senate report, like the House report, was titled "INCREASED PENALTIES FOR NARCOTIC AND MARIHUANA LAW VIOLATIONS" (S. Rep. No. 1051, 82d Cong., 1st

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[14] The Act of August 12, 1937 (*supra*, pp. 27-28) had placed *maximums* for terms of sentence for repeated offenders, but had not set required *minimum* terms (pp. 6-9).

Sess., Oct. 1, 1951) and it incorporated and accepted the text of the House report.[15]

At more than 20 additional points during the presentation of the bill, on the day of its passage by the House, reference was made to the increase of penalties —*e.g.*, "more severe sentences"—as a purpose of the bill (97 Cong. Rec. 8197-8200, 8204-8209).

When the bill came before the Senate, on October 20, 1951, Committee Chairman O'Conor stated, "penalties for violations must be increased. * * * Unfortunately, some of the Federal courts in the past have not faced this situation realistically, and, as a result, short sentences have been imposed. The professional drug peddler responsible for the widespread use has been able to return to his illicit trade all too soon" (97 Cong. Rec. 13676). And Senator Kefauver inserted in the record a further statement, by the Commissioner of Narcotics, urging the "increased" penalties (97 Cong. Rec. 13676).

Congress was not concerned with the fact that it was theoretically possible for a first offender to receive a fairly long sentence. Its concern was with the fact that offenders, first or later, were not receiving what it regarded as a desirable *minimum* sentence. It was not directing any significant attention to maximum sen-

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[15] The House hearings (Hearings before Subcommittee of Committee on Ways and Means, 82d Cong., 1st Sess., on H.R. 3490, April 7, 14, and 17, 1951) likewise were replete with testimony as to the need for increased penalities (pp. 40-42, 44, 46-52, 55, 58, 65, 67, 69, 71, 75, 77-78, 95, 203, 210, 217.

The Senate hearings (Hearings before the Senate Special Committee to Investigate Organized Crime, 82d Cong., 1st Sess., May 29, June 7, 12, 26, and 27, 1951) elicited repeated recommendations of increased mandatory prison sentences (pp. 353, 417, 425, 430-431, 455).

tences, for the record before it disclosed no concern on the part of the judges with the existing maximums, and there already were in effect higher maximums for second and subsequent offenders (H. Rep. No. 635, 82d Cong., 1st Sess., pp. 8-9). The committee reports pointed out a history of an over-all average sentence of only 23.1 months—less than the two years which was to be enacted as a *minimum* for the first offender (H. Rep. No. 635, p. 3; S. Rep. No. 1051, p. 3 (82d Cong., 1st Sess.)). The enactment of a maximum of five years, in the face of such a history, was clearly attended by little concern or attention, much less any objection to the possibility that one committing three offenses might be subject to a possible accumulation of 15 years in *aggregate* sentences.

As aptly stated by Judge Maris in *United States* v. *Brisbane*, 239 F. 2d 859, 861 (C.A. 3):

> These minimums and maximums [provided under the Boggs Act] apply to each offense, however, and not, as the defendant contends, to the aggregate of the sentences imposed for all the offenses committed in connection with a single sale of narcotic drugs. For, as we have pointed out, the purpose of the Boggs Act was to increase the penalties and make them more stringent. It did not, and it was not intended to, modify the previously existing rule of law that the maximum sentence of imprisonment, or a lesser one, might be imposed with respect to each offense and might be ordered to be served consecutively.[16]

[16] The court accordingly sustained, as here, consecutive sentences on (1) receipt and concealment of illegally imported narcotics, (2) sale not pursuant to written order, and (3) sale not in the stamped package, on the basis of a sale of heroin.

See also *United States* v. *Lewis*, 227 F. 2d 524, 525 (C.A. 2), certiorari denied, 350 U.S. 974.

The first offender is not necessarily a novice in the drug traffic. As pointed out by Judge McAllister in *Everett* v. *United States*, 227 F. 2d 457, 459 (C.A. 6):[17]

> * * * One who is convicted of a first offense for selling or dealing in narcotics is, often, an old hand at the game who has previously escaped arrest and conviction because he knows all the tricks. The purpose of the statute was not to give consideration to first offenders of the Narcotics law but to increase sentences for second and third offenders.

3. *The 1956 legislation.*—Since the 1951 legislation which governed petitioner's offenses in 1955, the Congress has given further, extensive, attention to the narcotics laws, eventuating in the Narcotic Control Act of 1956. Again the emphasis is on *increases* in penalties. Far from concerning itself with the multiplication of penalties involved in prosecution for several offenses in a single transaction, Congress instead created additional offenses, increased penalties, and differentiated penalties of the former types of offenses. A sale or transfer without the written order form, and a dealing in violation of the Narcotic Drugs Import and Export Act, are now respectively subjected to a 5 to 20 year sentence for the first offense, thereby increasing both the minimum and maximum, as well as allowing a maximum fine of $20,000. For a second or subsequent offense, the penalty is increased to 10 to 40 years, and a

[17] There, as here, the defendant contended that the Boggs Act limited the aggregate term of the consecutive sentences, but there was not, as here, an additional contention based upon commission of the separate offenses in a single transaction.

maximum fine of $20,000 may be imposed. In the case of an order-form offense, if the offender attains the age of 18 before the offense, and deals with one not yet 18, a sentence range of 10 to 40 years is provided, and a fine up to $20,000 (70 Stat. 568, 570). At the same time, the penalties for an unstamped package offense have been increased, the first offender now being subject to a range of 2 to 10 years' imprisonment. Second offenses are subject to a 5 to 20 year range of imprisonment and subsequent offenses to a 10 to 40 year range. A fine of not more than $20,000 is permitted as to each group of offenders. (70 Stat. 568) A difference in treatment of the various offenses also appears, in that suspension of sentence or probation is still permitted as to a first unstamped package offense, but not so in the case of a first offense as to the written order form or as to Section 2(c) of the Narcotic Drugs Import and Export Act. New offenses are created, including a heavily penalized offense of sale of heroin to juveniles (70 Stat. 571).

What is significant in these changes, for the problem in this case, is that the Congress has confirmed the separateness of the offenses of which petitioner was convicted by enacting a difference in the penalties, retaining the same separate definition and the same separate statutory provisions which commenced with separate enactment of the three offenses in the years 1909, 1914, and 1919, respectively, and which was virtually the statutory form passed upon, and held to create separate offenses, in *Blockburger*.

The Congressional explanation of the 1956 differentiation in penalties is illuminating. In H. Rep. No. 2388, 84th Cong., 2d Sess., p. 2, the order-form offense

and the offense against the Narcotic Drugs Import and Export Act are discussed as offenses of the "trafficker" while the stamped-package offense is treated as that of the "possessor." This emphasizes the point we have previously made that each of the three statutes—each of the offenses as such—serves a different purpose and is different in character, whatever the factual origin of the offenses in a particular case.

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In short, the amendments to the narcotics laws since *Blockburger*, which increased the penalties, did not effect any changes in the nature of the prohibitions and offenses, which, as we have shown, are different in purpose and character. All of petitioner's arguments based on the later legislation deal really, not with the nature of the offenses as such, but with their origin in a single act of sale in a particular case. Thus, petitioner stresses the fact that it is possible for a first offender to receive more than the minimum for a second offender if the act is charged in three counts. But if the first offender really did six separate acts—made six separate sales for example—there would be nothing incongruous in the fact that he was subject to a much more severe penalty than if he performed only one act. And this despite the fact that, for recidivist purposes, all six offenses would be a first conviction. As we have pointed out, any attempt to try to lump together the three separate offenses here involved as creating only one offense would result in needless confusion, and run counter to the whole Congressional treatment of the narcotics problem.

## II

**There Is No Double Jeopardy If the Offenses Are Different. The Relationship Among Closely Related Offenses Has Properly Been Left for Consideration by the Sentencing Judge.**

Petitioner argues that, if his offenses are not held to be one as a matter of statutory construction, they must be held one in order to avoid violation of the constitutional prohibition against double jeopardy. In so doing, he is admittedly asking this Court to reconsider a long line of cases which have held or assumed that the double jeopardy clause is not violated by multiple punishment,[18] or indeed by a second trial, if the two offenses as *offenses* are different, regardless of whether they arose out of the same act or closely related acts and were directed at closely connected evils. *Carter* v. *McClaughry*, 183 U.S. 365, 395 (conspiring to commit an offense, and committing the substantive offense); *Burton* v. *United States*, 202 U.S. 344, 381 (agreeing to receive proscribed compensation, and receiving such compensation); *Albrecht* v. *United States*, 273 U.S. 1, 11-12 (possession of liquor, and sale thereof); *Morgan* v. *Devine*, 237 U.S. 632 (breaking into a post office, and committing larceny therein); *Diaz* v. *United States*, 223 U.S. 442, 448-449 (homicide, and assault before the death); *King* v. *United States*, 280 U.S. 521 (selling morphine not in or from unstamped package, and shipping the morphine in interstate commerce); *United States* v. *Adams*, 281 U.S. 202, 204-205 (making a false entry in the books of a bank showing a credit, and making a false entry in a report of the condition

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[18] We do not dispute petitioner's position (Pet. Br. 54-60) that multiple punishment for the *same* offense after a single trial would be a violation of double jeopardy.

of the bank showing the same credit); *Korematsu* v. *United States*, 323 U.S. 214, 222 (disobedience of any one order of the various orders constituting separate steps "in a complete evacuation program"); *Pinkerton* v. *United States*, 328 U.S. 640, 643-644 (conspiring to commit an offense, and committing the offense); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 788 (conspiracy in restraint of trade, and conspiracy to monopolize, under Sections 1 and 2 of the Sherman Act); *United States* v. *Michener*, 331 U.S. 789 (causing a plate adapted for counterfeiting to be made, and possession of that plate); *United States* v. *Bayer*, 331 U.S. 532 (conspiracy to deprive the government of service of an officer, and the substantive offense); and *Pereira* v. *United States*, 347 U.S. 1 (violation of the mail fraud statute, violation of the National Stolen Property Act, and conspiracy to violate the two acts).[19]

Petitioner couches his suggestion for reconsideration as a request to this Court to reconsider the test for determining the issue of identity of offenses. He suggests that the Court abandon the test enunciated in *Blockburger* v. *United States*, 284 U.S. 299, which stems from *Rex* v. *Vandercomb*, 2 Leach C.C. 708, 709 (1796)[20] and which was reiterated in *Morey* v. *Commonwealth*, 108 Mass. 433 (1867),[21] cited in *Blockburger*. As we have pointed out (*supra*, p. 24), this

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[19] The Court noted the separability of the two substantive offenses, although the sentences thereon were concurrent (see Brief for the United States, No. 50, O.T. 1953).

[20] In that case, it was held that acquittal of breaking and entering and stealing was not a bar to prosecution for breaking and entering with intent to steal.

[21] The court there held that lewd cohabitation and adultery were separate offenses.

test is that offenses are different if each involves an element which the other does not. Petitioner suggests, as in his statutory argument, that the Court adopt the test that the offenses should be deemed the same unless they are aimed at a distinct social evil.[22] However, what petitioner is really seeking in this phase of his argument is a much more basic change in the judicial resolution of issues of multiple sentencing and double jeopardy, akin to the change he wishes to make in the determination of the character of the offense for statutory purposes. Petitioner assumes that this case must be decided, for double jeopardy purposes as well as for statutory construction, on his premise that the particular facts proved at his trial showed only one act of sale relating to the first three counts of the indictment. It is on that basis that he argues that here there was one social evil proscribed by those three counts. We do not understand him to argue that everything done by one defendant against the narcotic laws is one social evil and therefore one offense. We do not understand

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[22] Petitioner does not urge that this Court adopt the "single transaction" test. This was explicitly rejected in *Morgan v. Devine*, 237 U. S. 632. See also *Gavieres v. United States*, 220 U. S. 338 and *Albrecht v. United States*, 273 U. S. 1. It has never been the rule in the federal courts and is not the rule in most of the states. It is generally recognized, for example, that if by one act, such as throwing a rock through a window with intent to injure the person behind the window, a person damages both property and person, the injury to each is a separate offense. The American Law Institute, in its draft of a model penal code, suggests that offenses arising out of one transaction be prosecuted in a single trial but does not recommend that there be only one punishment if different injuries result from one act. See A.L.I. Model Penal Code, Tentative Draft No. 5, pp. 34-39. Commenting on the single transaction test, the draft points out that "A few jurisdictions recognize the 'same transaction' rule, but have had difficulty in defining it and in applying it consistently." (*op. cit.*, p. 36).

him even to argue that separate sales on different days or even separate purchase, transportation and sale of the same narcotics would still be one social evil, subject, under his suggestion, to only one punishment as a matter of constitutional double jeopardy. What he is arguing is that, where the facts of the particular case show one act by the defendant, separate punishment should not be imposed unless the resultant evils are different.

His assumption—that, in determining issues of double jeopardy, the courts look to the particular facts of the particular case, rather than to the general offenses as such—is exactly the one which this Court has refused to make in all of the decisions referred to above. *Blockburger* and the other decisions of this Court in this field, whether put in terms of statutory interpretation or double jeopardy, all embody the concept that issues of multiplicity of offenses are to be determined from the *elements* of the *offenses as defined in the statute*, without relation to the particular factual circumstances under which the crimes were committed in the particular case. This approach has not been overruled or modified in any of the later cases which have indicated a tendency to define offenses under particular statutes more broadly than was done in some of the earlier decisions arising under other statutes.

Without attempting to cover all the rulings of this Court, we think discussion of a few leading cases will illustrate the point. In *Ebeling* v. *Morgan*, 237 U.S. 625, this Court held that the cutting of six mail bags in the course of one transaction constituted six separate crimes. Looking at the face of the statute, the Court found that the evil against which Congress was legislating—the offense—was the cutting of *any* mail bag,

and that therefore each cutting was a separate offense. On the rationale that only the elements as defined in the statute are to be considered, that decision is eminently logical. The Court did not consider it relevant that, on the particular facts in the case before it, the cutting of six mail bags was by one act or closely related acts.

In *Burton* v. *United States*, 202 U.S. 344, the Court ruled that separate offenses were committed by a Senator in unlawfully receiving compensation and also agreeing to receive compensation in violation of the same statute. The Court said, 202 U.S. at 377:

> Congress intended to place its condemnation upon each distinct, separate part of every transaction coming within the mischiefs intended to be reached and remedied. Therefore an agreement to receive compensation was made an offense. So the receiving of compensation in violation of the statute, whether pursuant to a previous agreement or not, was made another and separate offense. There is, in our judgment, no escape from this interpretation consistently with the established rule that the intention of the legislature must govern in the interpretation of a statute.

Again, on the face of the statute, there can be no doubt that Congress did consider *agreement* to take a bribe an evil and also considered the *taking* of a bribe an evil. Undoubtedly, also, there can be factual situations where the agreement to take is in fact sufficiently separate from the actual taking of the bribe so that there would be a general consensus that the acts are separate and distinct. In the Court's approach it was therefore

not material whether *in the particular case* the agreement and the taking happened to coincide.

Similar in character is *Albrecht* v. *United States*, 273 U. S. 1, where, under the National Prohibition Act, a defendant was convicted of possession and sale of the same liquor at the same time. Certainly, possession of liquor under prohibition was itself an evil, and that possession could be sufficiently long antecedent to an act of sale to be in fact a separate crime. Looking to the evils as defined by the legislature, the decision in that case that the evils are separate is entirely sound, even though the possession and sale of the same liquor may coexist in the particular case.

The extent to which the difference in result depends upon whether the problem is approached from the general—*i.e.*, the statute—or the specific—*i.e.*, the facts of the particular case—is strikingly illustrated by comparing the ruling of this Court in *United States* v. *Michener*, 331 U. S. 789, with the decision of the Eighth Circuit in that case which this Court reversed, 157 F. 2d 616. There, the issue was whether consecutive sentences could be imposed on one count charging possession of a plate adapted for counterfeiting and a second count charging that, on the same date as that set forth in the first count, the defendant caused a plate to be made. Looking at the facts of the case as spelled out in the indictment, the Eighth Circuit held that the possession and causing of the plate to be made were so intertwined that two offenses had not been committed although the court conceded that "under a possible state of facts one could properly be convicted of the two offenses charged in the indictment", 157 F. 2d at 618. While this Court, in reversing, did not write an opinion beyond citing its earlier decisions, some of which have been discussed

above, it is evident from its citation of those opinions that the Court was looking at the problem more generally, that it was holding that Congress had legislatively determined that possession was an evil separate from the making of the plate, and that therefore the two offenses were separate.

The later decisions by this Court do not involve a change in this attitude. In *Bell* v. *United States*, 349 U. S. 81, the Court expressed no doubt that, if it were clear that Congress intended to punish separately the simultaneous transportation of two women, the transportation would result in multiple offenses, thus indicating that it was *the offense as defined by Congress* which was the question at issue. Similarly, in *United States* v. *Universal Corp.*, 344 U.S. 218, the Court was merely finding the unit of the crime as defined by Congress. While holding that violations of the Fair Labor Standards Act could not be separated into individual offenses with respect to each employee, the Court nevertheless affirmed the treatment of each different *kind* of violation as separate offenses, *e.g.*, (1) payment of less than 75 cents per hour, (2) underpayment of overtime, and (3) failure to keep proper records. The Court noted (344 U. S. at 221, fn. 4):

> Appellee does not urge in this case that § 15 prescribes only one offense even if there are three kinds of violations. Such an argument seems to have been made and was rejected, as to distinct requirements under two different sections of the act there involved, in *Blockburger* v. *United States*, 284 U. S. 299, 305, where the penal provision applied to "any person who violates or fails to comply with any of the requirements of this act."

*Prince* v. *United States*, 352 U. S. 322, also deals with the statute as such, finding on the basis of legislative history that Congress did not intend to punish both entry and a completed robbery after entry.

An illuminating decision on this point is *Sealfon* v. *United States*, 332 U. S. 575, where this Court, although it adopted a liberal rule of *res judicata*, reaffirmed the long established rule that issues of double jeopardy depend only upon the question of whether the offenses, as defined, are different. The Court ruled that the *offenses* of conspiracy and the substantive crime were separate, even though, on the *res judicata* aspect, it found that the "basic facts in each trial were identical" (332 U. S. at 580). What this decision has in practical effect accomplished is that, without overturning the long established rule that issues of double jeopardy depend only upon the offenses as defined, this Court has made trial for a related offense after an acquittal turn largely on how close two theoretically separate offenses are to each other in a particular factual situation. And there have been, since *Sealfon*, very few cases which have raised issues of retriability after acquittal.[23] Cf. *United States* v. *Adams*, 281 U. S. 202, 205, which drew the same distinction between double jeopardy and *res judicata* but was stricter in its interpretation of what had been previously adjudicated.

There is, we think, a ready explanation of why there has not been, and should not be, any equivalent develop-

[23] *Abbate* v. *United States*, No. 534, now before this Court, involves retrial after conviction by another sovereignty, and therefore presents quite different issues.

Since *Sealfon*, the only case of retrial after acquittal which the Court has considered is *United States* v. *Williams*, 341 U. S. 58, where the new trial was for the very different offense of perjury.

[Footnote 23 continued on page 46]

ment with respect to issues of double jeopardy in the context of consecutive sentencing. In the context of sentencing, any issues as to whether, in a particular factual setting, separate offenses are so related that multiple punishments should not be imposed to satisfy the ends of justice, in that particular case, can best be resolved by the trial judge. That is, in essence, where the prior decisions of this Court have left the matter, as the *Blockburger* decision itself indicates. The Court said in *Blockburger* (284 U.S. at 305):

> * * * Under the circumstances, so far as disclosed, it is true that the imposition of the full penalty of fine and imprisonment upon each count seems unduly severe; but there may have been other facts and circumstances before the trial court properly influencing the extent of the punishment. In any event, the matter was one for that court,

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[Footnote 23 continued from page 45]

(*Yates* v. *United States*, 354 U. S. 298, 335, did not involve a prior acquittal.)

In the Courts of Appeals, convictions were reversed on the basis of *Sealfon* in the following cases: *Simon* v. *United States*, 225 F. 2d 260, 262 (C. A. 3), where prosecution for possession was held precluded by a previous acquittal for receiving; *Cosgrove* v. *United States*, 224 F. 2d 146, 153, 157 (C.A. 9), involving conspiracy and aiding and abetting in different counts of one indictment when the jury had disagreed as to the retried counts; *Yawn* v. *United States*, 244 F. 2d 235, 237 (C.A. 5), involving trial for conspiracy after acquittal on a charge of possession.

Convictions were affirmed despite a *res judicata* argument in *United States* v. *Kaadt*, 171 F. 2d 600, 605 (C.A. 7), where, after acquittal for mail fraud, a defendant was tried for shipping misbranded drugs—an offense not requiring intent; *Kenny* v. *United States*, 236 F. 2d 128, 130 (C.A. 3), certiorari denied, 352 U. S. 894, involving retrial after disagreement on the count retried, where the reasonable interpretation was that the jury had not determined the fact at issue on retrial; and *United States* v. *Curzio*, 170 F. 2d 354 (C.A. 3), where on the prior acquittal for conspiracy, the trial judge had made it clear that he found no concert of action.

with whose judgment there is no warrant for interference on our part.

This seems to us to indicate that the Court expected that trial judges would take into consideration in imposing sentence, among other things, the relationship of particular counts to each other on the particular facts before the Court. Neither Congress, in defining offenses, nor this Court, by formulating general rules of law, can provide a standard for the imposition of sentences which will satisfy the just purposes of the criminal law for each and every particular fact situation which may arise. Under our system of administering the criminal law we must rely largely on the sound discretion of the sentencing judge who, having all the facts before him, is peculiarly able to determine what sentences will be in the best interests of both society and the individual defendant. Although it is accepted practice for the Government to charge a single transaction in multiple counts,[24] trial judges do not generally impose consecutive sentences for one act in the absence of aggravating circumstances.

Thus, the annual reports of the Director of the Administrative Office of the United States Courts for the years 1954-1957 (Table D4) show the following with respect to defendants in narcotics cases (not in-

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[24] From the point of view of indictment and trial, separate counts serve a very useful function in narrowing issues and clarifying the basis of a jury's verdicts. In narcotics cases, for example, there have recently been issues as to whether an apparent seller is merely acting as agent for a buyer. *E.g., Adams* v. *United States*, 220 F. 2d 297 (C.A. 5). Inclusion of a count under 21 U.S.C. 174 which covers concealment and transportation as well as sale would serve to clarify issues in such a case.

cluding marihuana) in the 86 district courts (*i. e.*, not including the District of Columbia and Alaska):

| Year | No. of defs. Convicted | No. sentenced to Imprisonment | Sentences Under 5 yrs. | Sentences 5 yrs. or over | Average Sentence by months |
|---|---|---|---|---|---|
| 1957 | 1049 | 941 | 344 | 594 [25] | 70.3 |
| 1956 | 1027 | 880 | 609 | 269 | 47.1 |
| 1955 | 1153 | 982 | 672 | 306 | 46.3 |
| 1954 | 1136 | 934 | 692 | 240 | 43.1 |

Since 5 years was the permissible maximum for one offense by a first offender in the years 1954-1956, and for some offenses the minimum after the 1956 Act, it is unfortunate that the statistics do not separate the five-year sentences from those for longer periods. The figures do indicate, however, that multiple sentences of more than the maximum permitted for one offense imposed for one transaction must be infrequent since the figures for those receiving sentences longer than five years would include persons making more than one sale as well as recidivists.

A study of District of Columbia cases prepared for the Senate Judiciary Committee covered the years 1952-1954 and the first half of 1955. Again, the figures do not show, except occasionally and incompletely, whether sentences were consecutive or concurrent, nor do they reveal how many transactions were involved. However, out of 629 persons sentenced in that period, only 142 received sentences of more than the five years permissible for a first offender on any one offense and of that number only 49 received sentences of ten years or more. See Hearings before the Subcommittee on Improvements in the Federal Criminal Code, of the Committee

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[25] The remaining sentences were under the Federal Youth Corrections Act, 18 U.S.C. § 5010.

on the Judiciary, United States Senate, 84th Cong., 1st Sess., pursuant to S. Res. 67, part 4, p. 1244.

Of the 142 District of Columbia sentences referred to above, 104 appear with more specificity in the individual listing of 447 cases prepared for the Hearings on the Traffic in and Control of Narcotics and Barbiturates before the Committee on Ways and Means of the House of Representatives, 84th Congress. Of those 104, 57 involved recidivists. Of the remainder, 34, it appears from the number of counts charged, clearly were based on multiple transactions. In five cases, including petitioner's, consecutive sentences seem to have been imposed for one transaction where other separate transactions were also charged in the indictment. Eight others appear to involve only one transaction, although it is impossible to determine whether, on the facts, there was evidence showing more than the mere act of sale. The average sentence for the District of Columbia in 1954 was 72 months (See Hearings, *op. cit., supra,* p. 1230). While no similar special study which would indicate sentences by counts, rather than in total, is available for the period since enactment of the Narcotic Control Act of 1956, it seems likely that, with the enactment of higher minimum penalties as the result of that Act, consecutive sentences based on one transaction will be even more infrequent.

Since the cases where consecutive sentences are imposed are the ones most frequently litigated, the problem tends, at the appellate level, to appear larger than it actually is. The possible inequality that may result from multiple counts in one district and not in others is really no greater than the possible inequality that results from the discretion given different judges to affix punishment. Indeed, as we have shown, *supra,* in the

years that followed *Blockburger*, the difficulty which Congress found in the action of sentencing judges in narcotics cases was, not that they were multiplying penalties, but that total sentences were far below the permissible sentence for any one offense.

Even where judges have imposed consecutive sentences despite the close relationship of multiple counts to each other, it will frequently be found that the total sentence could have been imposed on other counts without posing any issue as to multiplicity. An example is the sentence before this Court in *Bell* v. *United States*, 349 U. S. 81, where the sentencing judge imposed consecutive sentences of two and a half years on two counts (subsequently held by this Court to be one) when he could, under the statute, have accomplished the same result by imposing a five year concurrent sentence on those counts.

The situation in this case is not very different. Petitioner made two sales on two different days. These are two separate offenses on any theory and, as imposed, support ten years of the fifteen year sentence.[26] Even the third five year sentence is not as unrelated to the

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[26] Petitioner received consecutive sentences on counts 1, 2 and 3 for the first sale, and for the second sale sentences on counts 4, 5 and 6, to run concurrently by the counts and concurrently with those on 1, 2 and 3. (R. 5) Thus, counts 2 and 4 run consecutively to each other, even if all counts for the second sale are concurrent with count 1. Even assuming that punishment for the three offenses as to each sale should be merged in each other, there is no requirement that the sentence depend on any particular count. See Brief for the United States in Opposition, p. 3, *James Jones* v. *United States*, No. 446, Misc., certiorari denied, March 31, 1958. Thus, all three sentences for the first sale may depend on count 2, and all for the second sale on count 4. Consecutive sentences for the two separate offenses in counts 2 and 4 are therefore valid on any theory and petitioner's contention (Pet. Br. 50, fn. 30) that only one sentence may be sustained is without merit.

facts of this case as petitioner would make it appear. As noted, the indictment on its face charges, in the separate counts, not merely sale, but purchase and transportation as well. The evidence in this case was, as to each date, not only that petitioner sold narcotics each time, but that each time he left the apartment and came back before he made the sale, giving rise to an inference (at the very least) that he actually transported the narcotics before he made the sale and a possible further inference that he went out to purchase the narcotics so transported and sold. Even if a single act of sale, without such additional evidence and inference, should be regarded from a factual standpoint as a single offense, the evidence here was sufficient to establish, at the least, the factually separate offense of transportation and to justify a consecutive sentence for that offense.

We do not consider it necessary for the Court to decide any such issue as to the sentence in this case, even if the Court should wish to reconsider the *Blockburger* ruling. The impact of any such reconsideration on this sentence and the right of a defendant to assert on collateral attack that the transportation charged in the indictment was not proved could be resolved on remand at the district court level. The point that we stress is that the problem is not nearly as broad as petitioner would make it appear. Petitioner's whole argument, both on statutory construction and double jeopardy, resolves itself, upon analysis, into a contention that, on the particular facts of this case and assuming that there were only two acts of sale, the imposition of three sentences is unfair. The entire argument is based on a factual assumption as to a particular situation, and is therefore not really addressed to the purpose of Congress in defining the offenses or the separateness of the

offenses for the purpose of double jeopardy. The principle that multiple punishment amounts to double jeopardy applies only when the offenses as defined by Congress are the same. That, as we have shown, is not the case here. The offenses, as defined by Congress for all the various situations they may cover, are separate—whether the test is the different elements of each crime or the separate functions which they serve. What petitioner is really seeking is a new rule of sentencing that a judge should not be permitted to impose consecutive sentences where, on the facts of a particular case, offenses relating to one general social evil are committed by one act. He is really asking this Court to review the action of the district judge in imposing three sentences on the particular facts of this case, because, in his view, there were only two acts having the same anti-social motive. That problem is not a basis for distorting the purpose of Congress in creating three offenses or for overturning long established principles for determining when offenses are separate for the purpose of the jeopardy clause. *Blockburger* and the other decisions of this Court, applying the legislation Congress has enacted, have left it to the sentencing judge, who has the available facts and reports, to determine whether consecutive sentences should be imposed in the light of all the circumstances of a particular case, including the circumstances under which the offenses were committed. That is where, historically, decisions as to sentencing have been made. We submit that is where the issue should remain, unless and until Congress changes the legislation. And, as we have pointed out, we do not believe that, even on petitioner's theory, the total sentence in this case is invalid.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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